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# INTERNATIONAL LAW;

OR,

## RULES

*Regulating the Intercourse of States*

IN PEACE AND WAR.

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By H. W. HALLECK, A. M.

AUTHOR OF "ELEMENTS OF MILITARY ART AND SCIENCE," "MINING LAWS OF SPAIN AND MEXICO," ETC.

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## PREFACE.

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During the war between the United States and Mexico, the author, while serving on the staff of the commander of the Pacific squadron, and as Secretary of State of California, was often required to give opinions on questions of international law growing out of the operations of the war. As it was sometimes difficult or impossible to procure books of reference, except in the libraries of ships of war which occasionally touched at the ports of the northern Pacific, he commenced a series of notes and extracts, which were arranged under different heads, convenient for use. The manuscript so formed has been occasionally added to as new books were procured, and it is now given to the press, with the hope that it may be found useful to officers of the army and navy, and possibly, also, to the professional lawyer. With this view, a number of authorities are referred to at the end of each paragraph. It is proper to remark that these authorities are not quoted in support of the views expressed in the text, for they are sometimes directly opposed to the opinions so expressed. They will, however, be found to contain something upon the questions discussed, or upon matters immediately connected with them.

H. W. H.

San Francisco, Cal., May, 1861.

*NOTE.*—While the following pages are passing through the press, new and unexpected circumstances have arisen which prevent the author from giving that personal attention to correcting proof, so important in a work of this kind. It will, therefore, probably be found to contain some typographical errors, which would otherwise have been corrected.



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# INTERNATIONAL LAW.





## CHAPTER I.

### HISTORY OF INTERNATIONAL LAW.

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§ 1. In the following sketch of the history of international law, we shall divide the subject into periods of unequal length, but usually marked by some important event, and having

reference rather to the progress of the law than the history of nations. This plan seems preferable to that adopted by Hallam, of dividing it arbitrarily into periods of half a century each. We shall therefore consider the condition of international jurisprudence: 1st, Among the ancients; 2d, From the beginning of the christian era to the fall of the Roman Empire; 3d, From the fall of the Roman Empire to the beginning of the reformation; 4th, From the beginning of the reformation to the peace of Westphalia; 5th, From the peace of Westphalia to the peace of Utrecht; 6th, From the peace of Utrecht to the close of the seven years war; 7th, From the close of the seven years war to the beginning of the French Revolution; 8th, From the beginning of French Revolution to the congresses of Paris and Vienna in 1814 and 1815; 9th, From the congress of Vienna to the treaty of Washington in 1842; 10th, From treaty of Washington to the civil war in the United States in 1861.

These divisions are somewhat different from those adopted by other writers, but they seem to us most rational, or at least, as best suited to the very brief historical outline which we propose. (*Omnipeda, Literatur des Volkerrechts; Kamptz, Literatur des Volkerrechts; Hallam, Literature of Europe; Ward, Law of Nations; Wheaton, History Law of Nations; Phillimore, on International Law, preface.*)

#### FIRST PERIOD—INTERNATIONAL LAW AMONG THE ANCIENTS.

§ 2. The history of the Jews, as derived from the Old Testament and the writings of Josephus, furnishes much information relating to the rules by which the ancient Hebrews regulated their intercourse with other nations in peace and war. Grotius and other writers on international jurisprudence have illustrated their own views of public law by numerous examples taken from the history of this singular people, and Selden's *International Law of the Jews*, entitled *De Jure Naturali et Gentium juxta disciplinam Ebraeorum*, is a work of great erudition. He very justly distinguishes between the usages and practices which were susceptible of general application, and those limited rules of conduct which

constitute the *jus gentium* of the Roman lawyers. As might be expected from an isolated and religious people, most of the laws regulating their international intercourse in peace and war, were of the latter character. Nevertheless the history of the ancient Jews is well worthy of careful study in its connection with this branch of public law ; but it must be remembered there is much in the Jewish dispensation, although of divine revelation, which has exclusive reference to them as a peculiar people, with a special mission to perform, and therefore not of general application. (*Wheaton, Hist. Law of Nations*, pp. 103, 104; *Selden, De Jure etc., Ebraeorum*; *Josephus, Jewish Antiquities*; *Josephus, History of the Jewish War*; *Manning, Law of Nations*, p. 6; *Garden, De Diplomatie*, pt. 1; *Laurent, Droit des Gens*, tome 1, liv. 4.)

§ 3. Nearly all our knowledge of international law among ancient states is derived from their intercourse with the Jews, and with the Greeks and Romans, more particularly with the latter. Although no professed treatise on international jurisprudence has been left us by any classical writer, nevertheless much information respecting this branch of public law among the Greeks and Romans has been elicited from their civil laws and military ordinances, and from the history of their numerous wars,—information calculated to throw much light upon the rules by which, at different periods, they regulated their intercourse with other nations. Most of these rules were exclusively founded on religion. “The laws of peace and war, the inviolability of heralds and ambassadors, the right of asylum, and the obligation of treaties, were all consecrated by religious principles and rites. Ambassadors, heralds, and fugitives who took refuge in the temples, or on the household-hearth, were deemed inviolable *because* they were invested with a sacred character and the symbols of religion. Treaties were sanctioned with solemn oaths, the violation of which, it was believed, must be followed by the vengeance of the Gods. War between nations of the same race and religion was declared with sacred rites and ceremonies. The heralds proclaimed its existence by devoting the enemy to the infernal deities.” (*Wheaton's Elem. Int. Law*, pref. to third edition; *Wheaton, Hist. Law of Nations*, pp. 1–25; *Mackintosh, Miscellaneous Works*, p. 165 ;

*Ward, Law of Nations*, vol. 1, pp. 171 et seq.; *Manning, Law of Nations*, pp. 6–8; *Martens, Precis du Droit des Gens*, § 10; *Ritter, De Feciales Populi Romani*; *Garden, De Diplomatie*, pt. 1; *Laurent, Droit des Gens*, tomes 2 and 3.)

§ 4. What was called the law of nations (*jus gentium*) by the Romans, was not any positive system or code of jurisprudence established by the consent of all, or even the greater part, of the nations of the world, and applicable alike to themselves and others; it was simply a civil law of their own, made for the purpose of regulating their own conduct toward others in the hostile intercourse of war. It was, therefore, contracted in its nature, and somewhat illiberal in the character of its provisions. In proportion, however, as the Roman empire was extended, and as the Roman people established distant provinces and assimilated to itself the nations which it conquered, the *jus gentium* became more general and comprehensive in its character and more liberal in its precepts.

The Romans early incorporated into their maritime laws the principles of the nautical code of the Greeks, and as their commerce and intercourse with other nations increased, these laws became more liberal and general in their character and provisions. Many fragments of these old laws are still preserved and may be traced in the code Theodosian, the Code, Digest and Pandects of Justinian, in the Basilicæ, and the Maritime Constitutions promulgated by the emperor Leon. (*Wheaton, Hist. Law of Nations*, p. 29; *Ward, Law of Nations*, vol. 1, pp. 171, et seq.; *Mackeldy, (Kaufman,) Civil Law*, vol. 1, pp. 20, 21; *Manning, Law of Nations*, pp. 7, 8; *Boulay-Paty, Droit Com. Mar.*, t. 1, pp. 33–54; *Pardessus, Us et Coutumes de la Mer*, tom. 1, caps. 1–5; *Laurent, Droit des Gens*, tom. 3.)

#### SECOND PERIOD—FROM THE CHRISTIAN ERA TO THE FALL OF THE ROMAN EMPIRE.

§ 5. The doctrines of the christian religion, and the universality of their application, were well calculated to give a milder character and a greater extension to the principles of

international law, than they had received either under the Jewish dispensation, or the defective and multifarious system of the Greek and Roman mythology. But its progress was comparatively slow, and the bitter persecutions suffered by the early christians naturally engendered a spirit of retaliation. Moreover, it must be continually borne in mind, while tracing the history of international relations during the reigns of Constantine and the succeeding christian emperors, that the contests which they carried on with barbarous states were not of a character to develop the refinements of a *commercium belli*, or even to cause the observance of the acknowledged usages of war, or the previously established practices of international intercourse in peace. It is also to be observed that the seeds of intellectual deacease had already been sown, and that all branches of learning were on the decline, before the acknowledgment and toleration of christianity in the empire, by the formal edict of pacification at the hands of Constantine. "The revolution accomplished by Constantine," says Schlegel, "might have become a real, and by far the most comprehensive, regeneration of the Roman State, as it substituted for its originally defective and now completely rotten foundation of paganism, a new principle of life, and a higher and more potent energy of divine truth and eternal justice. But christianity had not yet become the universal religion of the people, and the empire of Rome,—otherwise the great reaction, which took place under Julian, had not been possible. The peasantry, in particular, continued for a long time yet attached to the old idolatry; and hence the name of pagans was derived. Even Constantine, though he publicly declared himself a convert to christianity, still did not dare to receive baptism immediately, and thus enter fully into the great community of christians. The administration of the Roman State was so completely interwoven with pagan rights and pagan doctrines, that, from an act of this public nature, dangerous collisions might have at first easily ensued. On the whole, the old Roman maxims and principles of state policy continued to prevail, even for a long time after the reign of Constantine; and the period had not yet arrived when christianity was to work a fundamental reform throughout the whole political

world,—and a christian government, if I may so speak, was to be established and organized on that eternal basis, and to strike a deep root and grow into the faith and life of the people, and into their habits and their feelings; but this great renovation was reserved for another and a later period.” (*Schlegel, Philosophy of History*, lec. 10; *Ward, Law of Nations*, vol. 1, p. 195 et seq.; *Garden, De Diplomatie*, pt. 1; *Laurent, Droit des Gens*, tome 4.)

§ 6. It is not within the object of this chapter to investigate or describe the causes which finally overthrew the mighty fabric which valor and policy had founded on the seven hills of Rome, nor to trace the history of those barbarous nations of the north, who, by their martial energy and irresistible numbers and force, imposed their yoke upon the ancient possessors of that vast empire, and permanently settled themselves in its fairest provinces. The decline of taste and knowledge for several preceding ages, and the general corruption of political partizans and office-holders, had prepared the way for this revolution, and the establishment of the barbarian nations on the ruins of the Roman empire in the west, was accompanied, or immediately followed, by an almost universal loss of that learning which had been accumulated in the Greek and Latin languages. What of classical learning is still preserved to us, is the mere fragments of those magnificent intellectual temples, which industrious antiquaries have dug up from the vast ruins of ancient greatness. These fragments, however, are sufficient to show the grandeur of the original structure and the beauty of its architecture; and the value of what remains, only increases our regret for what is irrecoverably lost. (*Hallam, Literature of Europe*, vol. 1, pp. 1, 2; *Schlegel, Philosophy of History*, lec. 10; *Gibbon, Decline and Fall of the Roman Empire*; *Garden, De Diplomatie*, pt. 1; *Laurent, Droit des Gens*, tome 4.)

### THIRD PERIOD—FROM THE FALL OF THE ROMAN EMPIRE TO THE BEGINNING OF THE REFORMATION.

§ 7. After the fall of the Roman empire, many cities still preserved their municipal constitutions, and the *jus gentium*,

in connection with the *jus civile*, into which many of its principles had become incorporated, continued to be practiced to a limited extent, both in Italy and the Provinces. Some have attempted to trace its influence upon the institutions and history of the different European nations, even through the darkest ages of human learning; it must, however, be admitted that this influence was not very marked in any case, and was by no means general. But on the restoration of the western empire under Charlemagne, the study of the Roman civil law, (and with it the *jus gentium*), was revived, and its professors were frequently employed in diplomatic missions, and as arbiters in disputes which arose between different cities and states. (*Laurent, Droit des Gens*, tome 4; *Wheaton, Hist. Law of Nations*, pp. 26–33; *Mackintosh, Miscellaneous Works*, p. 156; *Ward, Law of Nations*, vol. 1, pp. 211–236; *Manning, Law of Nations*, pp. 8, 9.)

§ 8. The origin of the law of nations in modern Europe has been traced to two principal sources,—the canon law, and the Roman civil law. It was founded, says Wheaton, mainly upon the following circumstances: “First, The union of the Latin church under one spiritual head, whose authority was often invoked as the supreme arbiter between sovereigns and between nations. Under the auspices of Pope Gregory IX., the canon law was reduced into a code, which served as the rule to guide the decisions of the church in public as well as private controversies. Second, The revival of the study of the Roman law, and the adoption of this system of jurisprudence by nearly all the nations of christendom, either as the basis of their municipal code, or as subsidiary to the local legislation of each country.” (*Mackintosh, Miscellaneous Works*, p. 165; *Wheaton, Elem. International Law*, pref. to third edition; *Garden, De Diplomatie*, pt. 1.)

§ 9. On the formation and consolidation of the christian government in modern times by Charlemagne, the human mind began to recover from its torpor, and art, science and learning sprung up out of the ruins of the ancient world. The church had constituted a kind of bridge, spanning the chaotic gulf which separated declining antiquity from modern civilization. The effects which this change produced upon international relations, and public law in general, may



be traced in the lives of such rulers as Charlemagne, the pious king Alfred, king Stephen of Hungary, Rodolph of Hapsburg, and St. Louis of France.

The power which the Bishop of Rome obtained, by his spiritual influence, first over the minds, and afterward over the temporalities of christian princes, did much for the civilization of Europe by the restoration and preservation of peace, and by restraining the ambitious and crafty from despoiling their neighbors. But the subsequent usurpations and tyranny of the Supreme Pontiff had well nigh destroyed the very foundation of international jurisprudence, by reducing each individual state to an absolute dependence, in all things, upon the papal will. The structure which christianity had rebuilt from the ruins of antiquity, was about to be pulled down by the very hands which had contributed most to its erection. (*Laurent, Droit des Gens*, tome 5; *Ward, Law of Nations*, vol. 2, pp.6-11; *Schlegel, Philosophy of History*, lec. 15; *Manning, Law of Nations*, pp. 10, 11; *Garden, De Diplomatie*, pt. 1; *Mackintosh, Miscellaneous Works*, p. 165.)

#### FOURTH PERIOD.—FROM THE BEGINNING OF THE REFORMATION TO THE PEACE OF WESTPHALIA.

§ 10. The reformation began to produce its effects upon the minds of men sometime prior to the advent of Luther. Its effects were by no means confined to articles of religious faith. A greater theological liberty was its immediate object, but this was intimately allied with political freedom; and these two necessarily caused a great change in the law of nations. The different states of Europe were ranged under different standards, and each party was united by a kind of *common cause*. Moreover, the separate members of each of the contending masses were bound together by principle or interest, rather than by any recognized paramount authority, for even the catholic states soon ceased to render full obedience to papal supremacy in matters purely temporal. This necessarily led to the independence of sovereign states, the true basis of international jurisprudence. The impulse which had been given to this subject by the canon law was gradu-

ally dying away, and the infant science was likely to be smothered and lost by papal dictation and tyranny, when the more liberal nations engendered by the reformation, rescued it from destruction and placed it upon a more sure and firm foundation. Its progress was thenceforth both certain and rapid. (*Laurent, Droit des Gens*, tome 5; *Ward, Law of Nations*, vol. 2, ch. 17; *Wheaton, Hist. Law of Nations*, pp. 69, 70; *Schlegel, Philosophy of History*, lec. 15; *Garden, De Diplomatie*, pt. 1.)

§ 11. Mr. Ward, in his “Enquiry into the Foundation and History of the Law of Nations in Europe from the time of the Greeks and Romans to the Age of Grotius,” has pointed out and discussed the influence of christianity and of the ecclesiastical establishments in laying the foundation and developing the principles of this branch of jurisprudence. He has also called attention to the obstacles placed in the way of its progress by religious intolerance, and the absurd and dangerous pretensions of the Popes to decide and determine, not only international disputes, but all questions relating to temporal matters connected with the government of independent states, and the effect of the reformation in establishing more liberal principles. Nor has he failed to notice the influence of the Roman law, of the feudal system, of chivalry, of treaties and conventions, and last, though not least, of those twin giants of modern civilization—Commerce and Trade,—and the maritime and commercial laws resulting from the increased intercourse between the people of different cities and countries. (*Ward, Law of Nations*, chap. 12, et seq.; *Emerigon, Traite des Assurances*, pref.; *Cicero, Pro Lege Manilia*, cap. 18; *Fabrot, Basilica*, tom. 6, p. 647; *Manning, Law of Nations*, p. 11; *Boulay-Paty, Droit Com. Mar.* t. 1, p. 56; *Laurent, Droit des Gens*, tomes 4, 5.)

§ 12. The Rhodians were probably among the first to adopt a regular system of laws and regulations relating to maritime trade. The compilation, known under the names of *Rhodian Laws*, and *Maritime Law of the Rhodians*, was probably not intended merely for the Island of Rhodes, or for the inhabitants of the Aegean Sea, but is rather a collection of maritime usages adopted at different periods and intended for different purposes. Some of them, perhaps,

preceded the later maritime laws of Rome and of the eastern empire. Such at least is the opinion of Pardessus. Next to the Rhodian laws are those found existing in the countries of the east conquered by the crusaders. These have been collected and translated by Pardessus. Next in importance we may mention the collection known as the *Rooles or Jugemens d'Oléron*. This collection of maritime customs or laws, was prepared under the direction of Queen Elenor, Duchess of Guienne, and named from her favorite island, Oléron. Some say it was prepared and first promulgated by her son, Richard I., Duke of Guienne and King of England. By whomsoever prepared, it was probably intended to serve as a maritime code for the western sea only. Next in order, Pardessus describes the collection called *Jugemens de Damme*, or *Lois de Westcapelle*, which is a compilation of the maritime customs of that part of Europe known at different periods as Belgium, Lower-Germany, Netherlands, Flanders, Holland, the United Provinces, etc. The maritime usages or laws known as the *Contumes d'Amsterdam*, *Laws of Antwerp*, etc., were probably intended exclusively for the northern portion of the Netherlands, and for the navigation of the Baltic and the Sound. The collection known as *Leges Wisbueses* or *Maritime Law of Wisbuy*, is supposed to contain the ordinances made by the merchants and masters of the town of Wisbuy, a city in the Island of Gottland, in Sweden, once a place of great commercial importance, but now in ruins. They were adopted by the Swedes and Danes, and probably regarded as authority by all the people beyond the Rhine. Many have considered the Laws of Wisbuy as an older compilation than the *Rooles d'Oléron*. (*Emerigon, Traité des Assurances*, pref.; *Selden, De Domino Maris*, cap. 24; *Manning, Law of Nations*, pp. 13, 14; *Azuni, Droit Maritime*, tom. 1, ch. 4; *Story, Miscellaneous Writings*, p. 100; *Pardessus, Us et Coutumes de la Mer*, tom. 1, caps. 5-11; *Boulay-Paty, Droit Com. Mar.*, tom. 1, pp. 69-76.)

§ 13. The *Consolato del Mare* is one of the most curious and venerable monuments of early maritime jurisprudence. Some have given it a very early date, and suppose it to contain the maritime laws and usages of the Greek emperors and of the states and cities bordering on the Mediterranean

and adjacent waters. They say it was adopted at Rome as early as 1075, but the researches of Pardessus and others have shown that its origin is much more modern. The first edition which can now be traced was published at Barcelona in 1494. It is regarded by critics as a record of customs, rather than an authoritative code of one or more nations. It embraces not only elementary rules for the construction of civil contracts relating to trade and navigation, but also the leading principles then recognized as governing the maritime rights of belligerents and neutrals in time of war. Chapter two hundred and seventy three of the *Consolato* contains many of the materials of the French *Maritime Ordonnance* of 1681, and many of its provisions and precepts are still referred to by writers on international law and by judges of admiralty and prize courts.

The *Guidon de la Mer* is supposed to have been composed for the benefit of the merchant traders of the city of Rouen, but the name of its author, and the date of its first publication have not been preserved. It is commented on in Cleirac's work, entitled *Les Us et Coutumes de la Mer*, which was published in 1647. Some of the maritime laws of France are supposed to have been first enacted at a very early period, but there is much difficulty in ascertaining their exact dates. Many of them are incorporated into the celebrated *Ordonnance de la Marine* of Louis XIV., published in 1681. From this we date the modern system of maritime and commercial law. (*Emerigon, Traité des Assurances*, pref.; *Clairac, Les Us et Coutumes de la Mer*, p. 2 et seq.; *Manning, Law of Nations*, p. 12; *Wheaton, Hist. Law of Nations*, pp. 60, 67; *Azuni, Droit Maritime*, tome. 1, ch 4; *Pardessus, Us et Coutumes de la Mer*, tome 2, caps. 12, 13; *Boulay-Paty, Droit Com. Mar.*, tome. 1, pp. 59-82; *Story, Miscellaneous Writings*, p. 100.)

§ 14. The most noted writers, prior to Grotius, on matters connected with international law, were Macchiavelli, Victoria, Soto, Suarez, Ayala, Bolaños, Bodinus, Brunus, and Gentilis.

Nicolo Macchiavelli was born at Florence, in 1469, and died in 1527. He filled various political offices, as Chancellor, Secretary, etc. His principal work, entitled *Il Principe*, was probably not intended as a mere scientific treatise, but was

written for a particular person, and for the purpose of effecting, at the time, a certain definite object. Its character has, therefore, often been misconceived by commentators. Machiavelli was a man of learning and talents, and his writings on history and politics had no inconsiderable influence upon his own and succeeding ages. Francisco de Victoria was a professor at the University of Salamanca. His *Relectiones* were first published at Lyons, in 1557; they were thirteen in number, but only the fifth and sixth related to subjects of international law. He died in 1633. Dominico Soto, born in 1494, was a pupil of Victoria, and his successor at Salamanca. His elaborate treatise, entitled *De Justitia et de Jure*, was published about 1560. Francisco Suarez was a Spanish Jesuit, and the most acute casuist of his age. He was the first to point out, in his treatise *De Legibus et Deo Legislatore*, the distinction between natural and consuetudinary law, and to show that international law rested not only on the principles of justice, but also on the usages of nations. He was born at Granada, in 1548, and died in 1617. Strange to say, his work is neither mentioned nor referred to by Grotius. Balthazar Ayala was Judge Advocate of the Spanish army in the Netherlands under the Prince of Parma, to whom, in 1581, he dedicated his treatise *De Jure et Officiis Bellicis*. Juan de Hevia Bolaños, was a native of Ovieda, in the Asturias, but his celebrated work, entitled *Curia Philippica*, was written in Peru, and, as he informs us, finished at the city of Los Reyes, on Christmas eve, in 1615. It is a work of great learning, and is often referred to on questions of commercial and maritime law. Jean Bodin, or Johannes Bodinus, as he is usually called, was born at Angiers, in France, in 1530, and died at Laon, in 1596. His great work, entitled *De la Republique*, was the first attempt at a scientific treatise on politics. Conrad Brunus was a German civilian. His elaborate treatise, entitled *De Legationibus*, was first published at Mainz, in 1548. Albericus Gentilis was born in the March of Ancona, in 1550, and died at London in 1608. He first studied in Germany, and afterward went to England, where he filled the chair of jurisprudence in the University of Oxford. His treatise, entitled *De Jure Belli*, was published in 1589, the titles to the chapters of which run

almost parallel to those of the first and third books of Grotius. He has the credit of having first mapped off the subject, afterward so ably treated by that eminent founder of international jurisprudence.

To the above list we may add the names of Peckius, a Belgian, who published his *Ad Rem Nauticam*, in 1556, but whose writings were not collected and published together till 1646; of Straccha, an Italian, and Santerna, a Portuguese, whose writings were published in the *De Mercatura* at Cologne, in 1623. (*Manning, Law of Nations*, pp. 17–19, 216; *Wheaton, Hist. Law of Nations*, pp. 34–54; *Mackintosh, Miscellaneous Works*, p. 166; *Hallam, Literature of Europe*, pt. 2, ch. 4; *Grotius, De Jur. Bel. ac Pac., Proleg.*, §§ 37, 38; *Encyclopedia Americana*; *Story, Miscellaneous Writings*, p. 105; *Real, Science du Government*, tome 8.)

§ 15. Hugo Grotius, justly regarded as the founder of modern international law, was the most remarkable man of the age in which he lived,—an age distinguished for men of genius and learning. He was born in 1583 at Delft, Holland. Being involved in the persecution of the pensionary Barneveldt and the other Arminians, he was imprisoned in the fortress of Louvestein, from which he escaped, through the devotion of his heroic wife, and took refuge in France. His great work, *de Jure Belli ac Pacis*, was published at Paris in 1625. He died at Rostock in 1645. This work has been translated into all languages, and has elicited the admiration of all nations and of all succeeding ages. Its author is universally regarded as the great master-builder of the science of international jurisprudence. In addition to his reputation as a writer on public law, he was almost equally distinguished as a statesman, diplomatist, historian, and theologian, and as a practical lawyer and eloquent advocate. His works on international law have been objected to for the profusion of classical quotations and historical illustrations, but these defects were necessarily incident to the particular period at which he wrote. These objections were answered by himself during his lifetime, and subsequently by the able and eloquent pen of Sir James Mackintosh. A more serious and well-founded objection has been made to his work, *de Jure Belli ac Pacis*, for its want of systematic arrangement, and the introduction

of questions and discussions which do not properly belong to the subject. It is characterized by profound thought, great perspicuity, and the most liberal and enlightened sentiment. Strange, however, as it may appear, the early opponents of his work charged him with attempting to annihilate the three great principles of the Roman law, "*Honeste vivere; Neminem ledere; Suum cuique tribuere.*" But such prejudice and puny opposition were soon overcome when the real character of his writings were understood.

Although Grotius had dedicated his great work on international law to Louis XIII. of France, it was strangely neglected by that king, who gave no reward to the author, Charles Louis, Elector Palatine, was the first prince to appreciate its utility, and ordered it to be publicly taught in his university of Heidelberg. The great Gustavus is said to have found the same pleasure in reading it as did Alexander in perusing the poems of Homer, and honored the author by calling him to a public employment in Sweden. In 1656, it was taught as public law in the university of Wittemburg, and before the close of the century, was universally established as the true fountain-head of European international law. Grotius wrote during the "thirty years war,"—that fierce struggle for religious and political liberty which was terminated a short time after his death by an honorable peace, based upon the principles which he had so ably and earnestly advocated. (*Wheaton, Hist. Law of Nations*, pp. 54–60; *Ward, Law of Nations*, vol. 2, chap. 18; *Phillimore, on International Law*, pref.; *Paley, Prin. Moral and Pol. Philosophy*, pref.; *Hallam, Literature of Europe*, vol. 3, chap. 4; *Mackintosh, Miscellaneous Works*, pp. 25, 126, 166; *Schlegel, Lectures on Modern History*, lec. 16; *Manning, Law of Nations*, pp. 20–25; *Martens, Precis du Droit des Gens*, § 12; *Garden, De Diplomatie*, pt. 1.)

#### FIFTH PERIOD—FROM THE PEACE OF WESTPHALIA TO THAT OF UTRECHT, 1648–1713.

§ 16. The peace of Westphalia, 1648, terminated the long series of wars growing out of the reformation, and that memorable struggle against the political preponderance of

the house of Austria, which, for thirty years, had devastated Germany and the north of Europe. "The peace that was at last brought about by necessity," says Schlegel, "constituted an epoch in European history. It was a great religious pacification—it was a recognition that to terminate by arms the dispute between the ancient faith and the new doctrines was an impossibility, and it was a settlement of legal relations between the adherents of the one creed and of the other." It not only gave greater religious tolerance and political liberty to the people of the older states, but also brought into existence new political communities which assumed the position of independent states. It was constantly referred to in subsequent treaties, and continued to form the basis of the conventional law of Europe until the French Revolution.

Although the treaty of Westphalia concluded the war in Germany, it continued to rage in other parts of Europe. The contest between France and Spain was terminated by the treaty of the Pyrenees in 1659; this was followed by the treaties of Oliva and Copenhagen in 1660; that of Aix la Chapelle in 1668; that of Nimeguen in 1678; that of Ryswick in 1677; and by that of Utrecht in 1713, which virtually restored the peace of Europe. (*Wheaton, Hist. Law of Nations*, pp. 69–152; *Phillimore, on Int. Law*, vol. 1, pref.; *Schiller, Hist. Thirty Years War*; *Waltmann, Hist. Peace of Westphalia*; *Schlegel, Lectures on Mod. Hist.*, lec. 17, 18.)

§ 17. The long and bloody wars which intervened between the peace of Westphalia, 1648, and that of Utrecht, 1713, and the conventions and treaties by which they were severally suspended or terminated, gave rise to numerous questions of international law, some of which were entirely new in the history of that science. Of the questions particularly discussed we may mention those relating to the independence and sovereignty of states, the liberty of the seas, the interpretation of treaties, the rights of conquest and of pre-emption, the theory of maritime prize, the law of sieges and blockades, the belligerent right of visitation and search, and the treatment due to prisoners of war. In many of these subjects a considerable advance was made from the restricted rules of the *jus gentium* of the Romans, and even from the



more liberal principles established by Grotius ; but in others the progress of this branch of jurisprudence scarcely kept pace with the increasing civilization of nations. (*Wheaton, Hist. Law of Nations*, pp. 69-152; *Phillimore on Int. Law*, pref., pp 12, 13; *Dumont, Corps Universel Dip., etc.*, tome 8.)

§ 18. The principal writers on constitutional law immediately following Grotius, were Selden, Hobbes, Puffendorf, Spinoza, Zouch, Loccenius, Molloy, Jenkins, Cumberland, Wicquefort, Rachel and Leibnitz.

John Selden was born in Sussex, England, in 1584, and died in 1634. He wrote a most able work on the law of nations, as derived from the institutions of the ancient Jews ; but he is better known by his work entitled *Mare Clausum*, published in 1635 as an answer to the *Mare Liberum* of Grotius. Thomas Hobbes was born in Malmesbury, England, in 1588, and died in 1679. His work entitled *De Cive* was published in 1647. He adopted the absurd theory that a state of nature is one of perpetual war in which brute force supercedes law and every other principle of action. Samuel Puffendorf was born in Saxony in 1632, and died at Berlin in 1694. He was professor of national law at Laud and afterwards Secretary of State at Stockholm. His principal work on public law, entitled *De Jure Naturae et Gentium*, was published in 1672. This treatise is far superior to that of Grotius in its plan and the mode of reasoning, but is less practical and original, and his style is too diffuse to be attractive. Baruch Spinoza was of a Jewish-Portuguese family, but born at Amsterdam in 1632 ; he died in 1677. He published a number of political and theological essays called *Tracts*, in some of which he treated of questions of international law. He agreed with Hobbes that the natural state of man is one of war, and avowed the detestable maxim that nations are not bound to observe their treaties any longer than it may be for their interest to do so. Richard Zouch was born at Anstey, Wiltshire, in 1590, and died in 1660. He was professor of Roman law at Oxford, England, and judge of the High Court of Admiralty. His principal works on public law, written about 1650, were entitled *De Jure Feciali, Sive Judio inter Gentes*, and *De Jure Nautico*. His writings are of high authority even at the present day, and are frequently

referred to by English judges and publicists, particularly on questions of maritime law. Contemporary with Zouch was the Swedish professor, Johannes Loccenius, who wrote in 1651. His principal work, entitled *De Jure Maritimo et Navali*, is often quoted as authority both by English and continental writers. He was born in 1599, and died in 1677. Charles Molloy published the first edition of his work, entitled *De Jure Maritimo et Navali* in 1666, and so popular was the book in England, that in 1769, it had reached the ninth edition. He was a native of Ireland, and died in 1690. Sir Leoline Jenkins was a judge of High Court of Admiralty, of England, and, although he wrote no professed treatise on any branch of public law, his official opinions and his letters (which have since been published) have had great weight with English judges and much influence upon the decisions of the British Courts of Admiralty. He was born in 1625, and died in 1684. Richard Cumberland was another English writer of great ability, noted rather as a philosopher than a lawyer. He was born in 1682, and died in 1719. His work, entitled *De Legibus Naturalibus*, was published in 1672. Abraham de Wicquefort was born in Amsterdam, in 1598, and died in 1682. His work on the law of diplomacy, entitled *L'Ambassadeur et ses fonctions*, published a short time before his death, was a work of considerable merit. Samuel Rachel was born in 1628, and died in 1691. He was a professor in the university of Kiel, and afterward minister of the Duke of Holstein—Gottorp at the congress of Nimiguen. His work, entitled *De Jure Naturae et Gentium* was published in 1676, and he was considered in Germany as the founder of a rival sect to Puffendorf. Baron Gottlieb Wilhelm Leibnitz was born at Leipsic in 1646, and died in 1716. He was the author of numerous works on philosophy and law, but left no complete treatise on international jurisprudence. His views on that subject are found scattered through his various publications and correspondence, and more particularly in his *Codex Juris Gentium Diplomaticus*, published in 1693.

To the foregoing list other names scarcely less distinguished might be added; but our limits will permit the mention of only a few. Stypmannus published his *Jus Maritimum* in 1652; Kuricke published his *Jus Maritimum Hanseatium* and

other tracts about 1667; and the *De Navibus et Navulo* of Franciscus Roccus was first published at Naples in 1655. All the writings of Roccus are regarded as works of great merit. The first mentioned of his treatises has been translated into English by J. R. Ingersoll of Philadelphia, and was published in 1809. Leo von Aitzema is the author of a valuable chronological sketch of events from 1621 to 1668, continued by L. Sylvius to the peace of Ryswick, 1697. It is entitled *Saken von Stæt en Oorlagh*, (Matters of State and War.) John Joachim Zentgravius, professor at Strasburg, wrote, about 1678, a work entitled *De Origine Veritate et Obligatione Juris Gentium*, in which he maintained against Puffendorf, the existence of a *positive law of nations*. Several writers on civil law of this period, have also discussed questions of international jurisprudence, and especially cases of conflict of laws. Of these we may mention the *Lois Civiles* of Domat, first published in 1687; *Praelectiones Juris Civilis* of Huber, published in 1686–1699; and the *Commentarias ad Pandectas* by the younger Voet (John), published in 1698. Wiseman's *Excellence of the Civil Law*, was published in London in 1686. (*Duponceau*, *Trans. of Bynkershoek*, int. p. 13 et seq.; *Wheaton*, *Hist. Law of Nations*, pp. 191 et seq.; *Mackeldey*, *Civil Law*, pp. 98 et seq.; *Encyclopædia Americana*, passim; *Manning*, *Law of Nations*, pp. 25–32; *Mackintosh*, *Miscellaneous Works*, pp. 166–168; *Real, Science du Gouvernement*, tome 8.)

SIXTH PERIOD—FROM THE PEACE OF UTRECHT TO THE END OF  
THE SEVEN YEARS WAR, 1713–1763.

§ 19. The peace of Utrecht was followed by the maritime war between England and Spain in 1739, which extended to France in 1744; by the continental war which grew out of the disputed question of the Austrian succession: the reigning houses of Bavaria, Saxony, Spain, Sardinia, and Prussia, on the death, in 1740, of Charles VI., (the last male descendant of the house of Hapsburg,) all claimed, under various pretexts, the entire or considerable portions of the dominions which had so long been united under the Austrian sceptre; and by the seven years war which Prussia

waged against the combined forces of Austria, France and Russia. This protracted and unequal struggle served to develop the military resources of Prussia and to display the brilliant genius of the Great Frederick. These wars were simultaneously terminated by the treaties of Paris and Hubertsburg in 1763. (*Phillimore, on Int. Law*, pref., p. 13; *Wheaton, Hist. Law of Nations*, pp. 165–261; *Mirabeau, De la Monarchie Pruss.*; *Lloyd, Hist. of the Seven Years War.*)

§ 20. During this period the celebrated question of the Silesian loan gave rise to important discussions on topics of international law, more especially with reference to belligerent rights, and the effects of a declaration of war upon international obligations previously contracted. Great changes were also made during this period in the maritime laws of nations, as regulating their commercial intercourse both in peace and war. France approximated her maritime rules more nearly to those of the *Consolato del Mare*, while Great Britain attempted to establish the doctrine which has since been denominated the “Rule of 1756,” and, as subsequently extended and applied, the “Rule of 1789,” of subjecting to capture in time of war any neutral commerce which is not open in time of peace. Many questions relating to precedence and etiquette and to the rights and privileges of public ministers, growing out of the increased intercourse of nations, were also discussed during this period. However vain and frivolous some of these contests may now appear, they must, nevertheless, be regarded as evidence of an increasing respect for the equality and independence of sovereign states. (*Wheaton, Hist. Law of Nations*, pp. 165–261; *Manning, Law of Nations*, pp. 226 *et seq.*; *Lord Liverpool, Discourse, etc.*; *Martens, Causes Célèbres du Droit des Gens*, tome 2.)

§ 21. This period was prolific in writers on international law, or on questions intimately connected with this branch of public jurisprudence. Among the most distinguished of these writers we may mention the names of Bynkershoek, Wolfius, Vattel, Montesquieu, Heineccius, Barbeyrac, Mably, Emerigon, Valin, Burlamaqui, Pothier, Casaregis, Real, Rutherford, Tindall, Hubner, Abrea and Dumont.

Cornelius Van Bynkershoek was born at Middleburg, in Zealand, in 1673, and died in 1743. His treatise, entitled

*De Dominio Maris*, was first published in 1702, but the greater part of his works were written after the peace of Utrecht. His celebrated *Quaestiones Juris Publicis* were published in 1737. He was the most distinguished public jurist of his age, and his works are still referred to as authority on many points. It must be remarked, however, that he attempted to revive the ancient severities of war with respect to the person and property of an enemy, and this portion of his writings not only differs from Grotius, Puffendorf, and others who preceded him, but is rejected by nearly all who have followed him. Christian Frederick Wolf, or Wolfius, as he is usually called, was born at Breslau in 1679, and died in 1754. His treatise called *Jus Gentium*, being an abridgement of his great work in nine volumes, was published in 1749. A French translation, by M. Formey, was published in 1758, under the title of *Principes du droit de la Nature et des Gens*. He was the first to distinguish the law of nations from that part of natural jurisprudence which treats of the rights and duties of individuals. Emmer de Vattel was born in the principality of Neuchâtel in 1714, and died in 1767. His treatise, *Droit des Gens*, published in 1748, was based on the work of Wolfius, but was a great improvement on the original. Although justly characterised by Mackintosh as "a diffuse, unscientific, but clear and liberal writer," and although a large portion of his treatise on the law of nations is taken up with the discussion of questions which do not properly belong to the subject, he is nevertheless referred to as authority, even at the present day, by judges, diplomatists and statesmen, more often, probably, than any other writer, not even excepting Grotius. The celebrated French philosopher, Baron Charles de Secondat Montesquieu, published his treatise, entitled *l'Esprit des Lois*, the same year, 1748, that Vattel published his work on international law. He was born in 1689, and died in 1755. Johannes Gottlieb Heineccius was born at Eisenberg in 1680, and died in 1741. Mackintosh said, he is "the best writer of elementary books with which I am acquainted." His work on international law, entitled *Elementa Juris Naturæ et Gentium*, was first published in 1738. Jean Barbeyrac was born at Beziers in 1674, and died in 1747. He is best known by his transla-

tions into French of the works of Grotius, Puffendorf, and Bynkershoek, to which he added very valuable notes. The Abbe Gabriel Bennot de Mably was born at Grenoble in 1709, and died in 1785. Being refused permission to publish in France, his treatise, entitled *Droit Publique de l'Europe*, first appeared in Holland in 1746. Balthazar Marie Emerigon was born in Provence in 1716, and died in 1784. Besides his great work on maritime law, entitled *Traité des Assurances*, he wrote commentaries on parts of the Ordinances of 1681. René Josué Valin was born at Rochelle in 1695, and died in 1765. His *Commentaire sur l'Ordonnance* was published in 1760, and his *Traité des Prises* in 1763. J. J. Burlamaqui, an Italian by birth, and Professor of Natural and Civil Law at Geneva, published in 1747 his admirable elementary work, entitled *Droit Naturel et du Politique*. This work was republished in 1810, under the title of *Principes du Droit de la Nature et des Gens*, with notes by De Felice and Dupin. Robert Joseph Pothier was born at Orleans in 1699, and died in 1772. He was the author of several law treatises which are of the highest authority, and has discussed some of the laws of war, and particularly those of maritime capture, in his *Traité de Propriété*. J. L. Maria de Casaregis, author of a treatise on maritime law, entitled *Discursus Legales de Commercio*, was born at Genoa in 1670, and died in 1737. Gaspard de Real's work, entitled *La Science du Gouvernement*, the fifth volume of which treats on international law, was completed in 1764, though begun at an earlier period. Thomas Rutherforth, born in 1712, and died in 1771, published in London, in 1754, his commentaries on Grotius, entitled *Institutes of Natural Law*. Mathew Tindall, born in 1657, and died in 1738, published his *Essay concerning the Laws of Nations*, in London, in 1734. Martin Hubner, born in 1725, and died in 1790, published his *Essai sur l'Histoire du Droit Naturel*, in London, in 1757, and his treatise, *De la Saisie des Bâtimens Neutres*, at La Haye, in 1759. Joseph Antonio de Abreu y Bertodano published at Madrid, in 1740, his *Colecion de los Tratados de Paz, Alianza, Neutralidad, etc.*, beginning in 1598 and extending to 1700. A continuation of this work to 1736 was published in 1796. An abridgement was also published about that time, entitled *Prontuario*

*de los Tratados de Paz, etc.* Felix Joseph Abreu published at Cadiz, in 1746, a valuable treatise on prizes, entitled *Tratado Juridico-Politico sobre las Presas*. A French translation of this work was published in 1758, and another in 1802, with notes by Bonnermain. A most valuable collection of treaties and diplomatic papers was made during this period by Jean Dumont, Baron de Carelsbroon. The first four volumes of this work were published in 1726, under the title of *Corps Diplomatique*. Dumont died in 1727, but four other volumes prepared by him were published after his death by Rousset, who subsequently added a supplement of several more volumes. (*Wheaton, Hist. Law of Nations*, pp. 165–261; *Phillimore, on Int. Law*, vol. 3, pp. 326, 545, note; *Encyclopedia Americana*; *Martens, Precis du Droit des Gens.*, § 12; *Garden, De Diplomatie*, pt. 1; *Azuni, Droit Maritime*, pt. 2, ch. 1; *Mackintosh, Miscellaneous Works*, pt. 171; *De Cussy, Droit Maritime*, tit. 1, pt. 3, § 39; *Manning, Law of Nations*, pp. 32–38.)

SEVENTH PERIOD—FROM THE SEVEN YEARS WAR TO THE FRENCH  
REVOLUTION, 1763–1789.

§ 22. One of the most important events which occurred in the history of Europe, between the peace of Paris and Hubertsberg, 1763, and the French Revolution, 1789, was the partition of Poland, or rather the three partitions of that kingdom. The first of these was made in 1772, the second in 1793, and the third, by which the remaining territories of unfortunate Poland were absorbed by Austria, Prussia, and Russia, took place in 1795. The war of Bavarian succession, which occurred in 1778, was terminated by the peace of Teschen, under the mediation and guarantee of France and Russia, in 1779. This was followed by the mediation of France between the Emperor Joseph II., and the United Provinces, in the question of the free navigation of the river Scheldt, which was settled by the treaty of Fontainebleau, in 1785. In 1788 Prussia interfered in the internal affairs of Holland in favor of William V., and, with an army under the Duke of Brunswick, overthrew the liberal party, and

restored the Stattholder to the plenitude of his authority, which was guaranteed by the tripple alliance of 1788 between Great Britain, Prussia, and Holland. This tripple alliance interfered between the Emperor Joseph II., of Austria, and his revolted subjects in Belgium, at the Congress of the Hague, in 1790, forcing the latter to submit to the imperial authority. The same powers compelled Denmark to withdraw the coöperation she had furnished Russia against Sweden in 1788, and the war was terminated by the peace of Werela, in 1790. The wars between Austria and the Porte, and Russia and the Porte, were also terminated under the mediation of the tripple alliance, the former by the treaty of Szistowe, in 1791, and the latter by the treaty of Jassy, in 1792. But the most important event of this period was the revolt of the British provinces in North America, and the war of the American Revolution, in which France afforded material aid to the revolutionary party. This war was terminated by the treaty of Versailles, in 1783, by which Great Britain recognized the independence of her revolted colonies, and the United States of America took their place as a sovereign state among the nations of the world. (*Ompheda, Literatur Volkerrecht*; *Wheaton, Hist. Law of Nations*, pp. 269–328; *Botta, History of the American Revolution*; *Grahame, History of the United States*; *Bancroft, History of the United States*; *Martens, Recueil des Traités*, tomes 1–10.)

§ 23. The more important questions of international law agitated during this period, were those in reference to the rights of sovereignty and independence, arising out of the partition of Poland and the Bavarian succession; the right of mediation, arising out of the interference of the tripple alliance in the wars of Russia, Austria, Sweden, Denmark, and the Porte; the right of intervention, arising out of the interference of Prussia in the affairs of Holland, and of the tripple alliance in the affairs of Belgium; and the right of revolution, arising out of the revolt of the British Provinces of North America. Important questions of maritime jurisprudence were also agitated during this period, such as the rule of *free ships, free goods*, which was recognized and attempted to be established by the French ordinance of 1778; the rights of neutral commerce, declared by the armed



neutrality of 1780; and the abolition of privateering, as agreed upon by Prussia and the United States in the treaty negotiated by Franklin in 1785. (*Wheaton, Hist. Law of Nations*, pp. 269–328; *Franklin, Life and Works*, vol. 2, p. 448; *Martens, Recueil de Traités*, tomes 1–10; *Russell, Hist. Mod. Europe*, vol. 3; *Oempteda, Literatur Volkerrecht*; *Rotteck, Hist. of the World*, vol. 3; *Sparks, Dip. Cor. of the American Revolution*; *Pitkin, Civil and Pol. Hist. U. States*.)

§ 24. The most distinguished writers of this period, on questions of international law, were the Mosers, Lampredi, Galiani, Martens, Mirabeau, and Bentham.

John Jacob Moser, born in 1701, and died in 1785, first published a small work on international law in 1750; but the publication of his larger and more celebrated work, in ten volumes, under the title of *Essay on the Modern Law of European Nations*, (*Versuch des Neuesten Europäischen Volkerrechts*), was commenced in 1777 and completed in 1780. He bases the principles of the law of nations on treaties and usages, and contends that the rules of that law must be inferred from examples, and cannot be applied *a priori* to test the validity of a particular precedent. His supplementary work, entitled *Beytrage zu den Europäischen Volkerrecht*, of which seven volumes had been published in 1781, was never completed. F. C. de Moser published his *Kleine Schriften*, in twelve volumes, in 1751, and his *Beytrage zu dem Europäischen Staats-und Volkerrecht*, in four volumes, in 1772. Gio M. Lampredi, an Italian, born in 1761, and died in 1836, published at Leghorn, in 1778, his *Juris Naturae et Gentium*, in which he incidentally considered questions relating to the rights of belligerents and neutrals. This work was severely criticised by the Abbe Galiani. In 1788 he published, at Florence, another work, entitled *Comercio dei Popoli Neutrali in tempo di Guerra*, in which he returned the compliment by criticising the work of the Abbe. This latter work, entitled *Dei Doveri dei Principi Neutrali*, etc., was first published at Naples, in 1782. Its author, the Abbe Fernando Galiani, was born in 1728, and died in 1787. Lampredi's second work was translated into French by Jacques Peuchet, and published at Paris in 1802, under the title of *Du Commerce des Neutres en temps de Guerre*. George Frederick Von Mar-

tens was born at Hamburg in 1756, and died in 1821. A syllabus of his lectures at the University of Goettengen, on international law, was first published in 1785, but this work was afterward enlarged, and published in French in 1788, under the title of *Precis du Droit des Gens Modern de l'Europe*. The subsequent works of Martens will be noticed in another place. Count Honoré Mirabeau was born in 1749, and died in 1791. His work on the Prussian Monarchy, and his speeches on great national questions during the early part of the French revolution, have given a world-renown to his name. In his work, entitled *Doutes sur la Liberté de l'Escaut*, he most ably defended the cause of Holland in the question of the free navigation of the Scheldt, which was settled by the treaty of Fontainebleau in 1785. Jeremy Bentham was born in 1749, and died in 1832. His essay on international law was written at various dates between 1786 and 1789, but he never completed the work, these fragments being published at a later period. His plan for a perpetual and universal peace, although utterly impracticable, has formed the basis of numerous peace societies in England and the United States.

In addition to the foregoing list of distinguished authors, we will briefly refer to a few others who have written on this subject. J. J. Neyron published, in 1783, a small work on the principles of the law of nations, which was followed by others. Charles T. Gunther published, in 1777, an anonymous work on this subject, which was followed, in 1787 and 1792, by the first and second volumes of his *Europaisches Volkerrecht in Friedenszeiten*, (European law of nations in time of peace,) a work which he did not live to complete. C. H. Van Romer published his *Volkerrecht der Dutchen* in 1789, at Halle. Frederick Aug. William Wench published the first volume of his *Codex Juris Gentium Recentissimi* in 1781, and the third in 1796. Schmass published, in 1774, his *Corpus Juris publici Academicum*, which was augmented by Hommel in 1794. We must not conclude this list of writers on international law without mentioning the name of Benjamin Franklin, the American statesman and philosopher, who wrote against privateering, and was the negotiator of the treaty of 1785, between the United States and Prussia, for

its suppression. He was born at Boston in 1706, and died in 1790. (*Wheaton, Hist. Law of Nations*, pp. 269–328; *Mackintosh, Miscel. Works*, pp. 157–164; *Encyclopædia Americana*; *Martens, Precis du Droit des Gens*, § 12; *Garden, De Diplomatie*, pt. 1; *Sparks, Life and Writings of Franklin*; *De Cussy, Droit Maritime*, lib. 1, tit. 3, § 39.)

FROM THE BEGINNING OF THE FRENCH REVOLUTION TO THE  
CONGRESS OF VIENNA, 1789, 1815.

§ 25. The conflict of opinions and interests growing out of the events of the French revolution engendered a war which soon involved nearly all the nations of Europe, and finally embraced in its tortuous folds the sparsely populated continent of America. It is not necessary to particularise here each separate declaration of war, or to notice the cause which produced it and the treaty by which it was suspended or finally terminated. This contest had its origin in a violation of the rights of independent and sovereign states, by the armed intervention of the allies in the internal affairs of France, on the one side, and by the efforts of the French propagandists on the other, to revolutionize the governments of other countries. The whole period—from 1789 to 1815—is marked by encroachments on the true principles of international law, and a total disregard of the rights of the smaller states was manifested by the treaties of Paris and Vienna, by which the peace of Europe was restored. The war of 1812 between the United States and Great Britain originated in violations of the maritime law of nations, by the capture and confiscation of American vessels engaged in neutral trade, and the impressment of American seamen on the high seas, under the pretext of exercising the right of search for British subjects by virtue of the municipal laws of Great Britain. This war was terminated by the treaty of Ghent, in 1814, on the basis of the *status quo ante bellum*, leaving undecided the questions in which it originated. (*Wheaton, Hist. Law of Nations*, pp. 345, 425; *Mackintosh, Miscel. Works*, pp. 461–465; *Jomini, Les Guerres de la Revolution*; *Jomini,*

*Vie Pol. et Mil. de Napoleon*; Alison, *Hist. of Europe*, first series; Armstrong, *Notices of the War of 1812.*)

§ 26. The political discussions of this period embraced almost the entire range of diplomacy, and questions were agitated respecting nearly every established principle of the law of nations. Among those of most interest we may mention the right of armed intervention in the internal affairs of independent sovereign states, growing out of the French revolution in 1789; the rights of war with respect to private property on land, including booty, pillage, and military contributions; the rights of military occupation and conquest; the law of sieges and blockades; the treatment due to prisoners of war, with the right and duty of exchange; and the general rules which should regulate the pacific intercourse of belligerents. The controverted questions of maritime law included almost every right of neutral commerce; the term contraband of war was extended to include nearly every thing in which a neutral could trade with profit; whole coasts were blockaded by mere decrees and orders in council; colonial and coasting trade was closed to neutrals, their vessels were searched, and their seamen impressed, in virtue of merely local and municipal laws. In fine, every imaginable pretext was resorted to in order to destroy the commerce of neutral states, or to force them to abandon their neutrality and join the dominant maritime power of Europe which sought, and almost acquired, the entire control of the seas. (*Wheaton, Hist. Law of Nations*, pp. 345–425; Alison, *Hist. of Europe*, first series; Jomini, *Vie Politique et Mil. de Napoleon*; Napoleon, *Memoirs dictated at St. Helena*; Duer, *Lectures on Insurance*, vol. 1.)

§ 27. This was eminently a period of action and of great events, rather than of calm discussion and philosophical investigation. Although questions of international law were frequently discussed with learning and ability in diplomatic correspondence and state papers, the works of professed text-writers on this branch of jurisprudence were neither very numerous nor of a very marked character. Nevertheless, there were published, during this period, a number of works worthy of particular notice, and among the authors who wrote or published at this time, we may mention Azuni,

Martens, Kant, Koch, Savigny, Ward, Mackintosh, Dou, Flassan, Rayneval, etc.

Dominico Alberto Azuni, a native of the island of Sardinia, (died 1827,) published his *Sistema Universale dei Principi del Diritto Marittimo dell' Europa*, in 1795; but the work was afterward remodeled and enlarged, and published in French, in 1797, under the title of *Droit Maritime de l' Europe*. A translation, by Mr. Johnson, was published in New York, in 1806. George Frederick von Martens, who has already been mentioned, published during this period several important works connected with diplomacy and the treaties celebrated between the different states of Europe. The great German philosopher, Emanuel Kant, (born 1724, died 1804,) as a writer on international law, properly belongs to this period, although a portion of his works were published at an earlier date. That part of his works relating to the law of nations, was translated into French and published in Paris in 1814, under the title of *Traité du Droit des Gens*. Like Bentham, he advocated a project of perpetual peace, founded upon a confederation of free states. His principles have been ably contested by Hegel. Christopher G. Koch, a native of Alsace, (born 1737, died 1813,) published, in 1796, his *Abrégé de l'Histoire des Traités de Paix*. This was followed by other historical collections. Frederick Charles Savigny, a native of Frankfort-on-the-Maine, (born 1779,) belonged to what is called the historical school of German lawyers. His work on the *Law of Possession*, was written in 1803, but his *History of the Roman Law in the Middle Ages*, was not published till 1815. All his writings are rather of a historical than a philosophical character. Robert Plummer Ward, an English author, (born 1765, died 1846,) published, in 1795, his *History of the Law of Nations in Europe*, from the time of the Greeks and Romans to the time of Grotius; it is a work of great ability. Sir James Mackintosh, another English writer of note, delivered a course of lectures in 1797, in Lincoln's Inn Hall, on the *Law of Nature and Nations*; but the subject being unattractive to an English auditory, only the *Introductory Discourse* was published. It is found in his *Miscellaneous Works*, and contains an admirable review and criticism of the works of other publicists.

Don Ramon Lázaro de Dou y de Bassóls, a Spanish author, published, in 1802, his work entitled *Instituciones del Derecho Publico General*. J. M. Gérard de Rayneval, a native of Alsace, (born 1736, died 1812,) first published his work, entitled *Institutions du Droit de la Nature et des Gens*, in 1803. M. de Flassan, a native of France, published in 1811, his *Histoire General de la Diplomatie Francaise*, and, in 1814, his *Histoire du Congress de Vienne*. Thomas Hartwell Horne, an English author, published, in 1803, a *Compendium of Admiralty Decisions*, and, subsequently, a *Treatise on Diplomacy*. J. Jouffroy published, in 1806, his *Droit des Gens Maritime Universel*. F. J. Jacobson published, in 1804, his *Handbuch über das praktische Seerecht*, etc., and, in 1815, his work, entitled *Seerecht das Kreigs und des Friedens*, etc. A translation of this work, by William Frick, was published, in Baltimore, in 1818. J. N. Tetens published, in 1805, a work on the reciprocal rights of belligerents, and, in 1811, Count Merlin published his valuable *Repertoire*, which has since been greatly enlarged. De Steck published, in 1790, his *Essay sur les Consuls*. Warden, United States Consul General in France, published, in 1815, a valuable work on the same subject, which was translated into French by Barrère. John E. Hall published, in Baltimore, in 1809, a treatise on Admiralty Practice, in which he embodied a translation of Clerke's *Praxis*, which was first published in latin, in 1679. Robinson published his *Collectanea Maritima*, in London, in 1801. Marin published his *Derecho Natural y de Gentes*, in 1800. (*Alison, Hist. of Europe*, first series; *Jomini, Vie Politique et Mil. de Napoleon*; *Napier, Hist. Peninsular War*; *Thiers, Hist. Rev. Con. and Empire*; *De Cussy, Droit Maritime*, lib. 1, tit. 3, § 39; *Hoffman, Legal Studies*, title 9; *Wheaton, Hist. Law of Nations*, pp. 345–425.)

§ 28. But any deficiency in the number and character of professed writers on public law during this period is more than compensated for by the decisions of judicial tribunals on questions of international law, and more particularly of the maritime law of nations, the opinions delivered by the judges being often characterized by profound learning and great legal ability. Of the English judges of admiralty and prize, Sir William Scott, afterward Lord Stowell, was unquestion-

ably the most able and the most distinguished. Mr. Duer very justly remarks: "In the same sense in which Lord Mansfield is usually termed the father of commercial law in England, Sir William Scott may be justly regarded as the founder of the law of maritime capture. Its principles, it is true, had been stated by the great writers on public law—Grotius, Puffendorf, Vattel, and Bynkershoek—but they were stated in terms so loose and general, as rendered them too liable to be differently understood and applied by different nations. It is, by a series of judicial decisions, in the prize courts of England and of the United States, and principally by those of Sir William Scott, that these principles have been rendered clear, definite, and stable; by their extended application, in practice, have been rescued from the domain of theory, and by successive elucidations and varied illustration, have been expanded and wrought into a consistent, harmonious, and luminous system. The opinions of Sir William Scott, the chief architect of this noble structure, are those, not merely of a jurist, but of a scholar, philosopher, and statesman; and they are as much distinguished by the beauties of their composition, as by their sagacity and learning, and comprehensive views." (*Duer on Insurance*, vol. 1, pp. 746, 747; *Manning, Law of Nations*, pp. 45–47; *Phillimore, On Int. Law*, vol. 1, pref., pp. 21, 22; *Story, Miscellaneous Writings*, p. 282; *Hoffman, Legal Studies*, vol. 2, pp. 458 et seq.)

NINTH PERIOD—FROM THE CONGRESS OF VIENNA TO THE TREATY OF WASHINGTON, 1815–1842.

§ 29. Europe, exhausted by the great wars of the French revolution and empire, which were terminated by the treaties of Paris and Vienna, in 1814 and 1815, enjoyed a long period of general peace, interrupted only by the internal revolutions of Greece, France, Belgium, Poland, etc., and the war between Russia and the Porte, which was terminated by the treaty of Adrianople in 1829. These wars, however, were too limited in their extent and too temporary in their character to disturb the general tranquility of nations. The les

sons of the past had taught the allies, and particularly Great Britain, the impolicy of dictating to others the form and character of their government, or the person of their ruler; and when France, in 1830, revolted and dethroned her king, again exiling the Bourbons whom the allies had forced her to receive in 1815, she was permitted to form her own government and select her own sovereign without molestation or foreign interference. The same regard for the principles of international law, and the rights of sovereign states, was not shown in some other cases; but the right of intervention in the internal affairs of other states, where not justified or required by existing treaties, was not only not claimed, but expressly denied by British statesmen. In America, during this period, the Spanish and Portuguese provinces, following the example of their northern neighbors, revolted against the governments of the mother countries, and, after a contest of many years, succeeded in establishing their independence, and assumed the position and rank of sovereign states. The United States, profiting by the long peace to people her wide domain by European immigration, and to build up her commercial marine by unrestricted trade with other countries, rapidly became a formidable rival to the great maritime powers of Europe. But the treaty of Ghent had left undecided the important questions which had been involved in the war with Great Britain in 1812, and new causes of difficulty were continually arising between the two countries. The latter forbore, it is true, any attempt to visit and search American ships for her own seamen, but claimed the right to *visit* such vessels on the high seas in order to determine their character and ascertain if they might not be engaged in the slave trade. Moreover, the dispute with respect to the northeastern boundary, and the capture and destruction of the "Caroline" on the Canadian frontier by British forces, within American territorial jurisdiction, so involved the relations of the two countries, and so embittered the feelings of both nations, that war seemed almost inevitable. But cooler and wiser counsels prevailed, and most of these points of dispute were happily settled by the treaty of Washington in 1842. (*Wheaton, Hist. Law of Nations*, pp. 425-758; *Alison, Hist. of Europe*, second series; *Capefigue, Hist. de la Restauration*; *Capefigue, L'Europe depuis l'avenement du roi Louis Philippe*.)



The more important questions of international law, agitated during this period, were the right of armed intervention, as in the case of Naples, Spain, Greece and Belgium; the right of forcible annexation, as in the case of the kingdom of Poland; the internal and external rights of confederated states, as in the case of the Germanic and Swiss Confederations; the rights of sovereign and independent states to change their government, as in the case of France, Belgium, etc.; the free navigation of great rivers which divide or run through different states, as the Rhine, the St. Lawrence, the Mississippi, etc.; the right of territorial jurisdiction over inland waters, as the Black Sea, the Dardanelles, the Bosphorus, etc.; the right of colonial revolution and independence, as in the case of Mexico and the Spanish and Portuguese provinces of South America; the right of visitation on the high seas in time of peace to search for slavers; and the inviolability of neutral territory, as in the case of the destruction of the steamer "Caroline" by British forces, within the territorial jurisdiction of the United States. Another question agitated during this period, and most warmly discussed in the British Parliament, was the right of the people of one state to assist, in time of peace, the insurgent colonies of another state. This question arose with respect to the expeditions fitted out in England in aid of the insurgents of Spanish America—expeditions similar in character to those which in the next period were organized in the United States, and generally known as "filibuster expeditions." Laws were passed, nominally to prohibit them, but these laws were a mere dead letter upon the statute-books. In addition to the men, arms and munitions of war furnished by Great Britain, it is estimated that she advanced, in loans to the revolutionary governments of South America, between 1820 and 1840, the sum of one hundred and fifty millions pounds sterling, nearly all of which was lost by the faithlessness and insolvency of the governments and states which received it. The entire loss of Great Britain by these advances, and the reaction produced thereby in 1825, is estimated at three hundred millions pounds sterling, or fifteen hundred millions of dollars! Moreover, the export trade from Great Britain to America, (exclusive of the

United States) which, in 1809, before these revolutions begun, was eighteen millions, fourteen thousand, two hundred and nineteen pounds, had sunk, in 1827, to one million two hundred and ninety thousand pounds, and even, in 1842, had only reached two millions three hundred thousand pounds! "Such," says Alison, "have been the effects, even to the immediate interests of England, of her iniquitous attempt to dismember, by insidious acts in peace, the dominions of a friendly and allied power! Providence has a just and sure mode of dealing with the sins of men, which is, to leave them to the consequences of their own actions." That the aids thus afforded by Great Britain, or rather, by the people of Great Britain, for the government pretended to discountenance and oppose it, were in direct violation of the plainest maxims of international law, no one will venture to deny. In this case at least, punishment followed close upon the commission of the crime! (*Wheaton, Hist. Law of Nations*, pp. 425–758; *Alison, Hist. of Europe*, ch. 67, §§ 47–91; *Alison, Hist. of Europe, Second Series*, ch. 4, §§ 103–106.)

§ 31. Among the authors of this period who have treated of matters connected with international law, we may mention the names Kamptz, Kluber, Hegel, Wheaton, Kent, Story, Manning, Bello, Pfeiffer, C. D. Martens, Garden, Pardessus, etc.

C. A. Von Kamptz published at Berlin, in 1817, his *Neue Literatur des Volkerrecht*. It is a continuation of the work of Ompteda, and the two form a valuable history of the law of nations. Jean Louis Kluber, (born 1762, died 1837,) first published his *Droit des Gens Moderne d' l' Europe*, in 1819; a German edition, entitled *Europaisches Volkerrecht*, was published in 1821, and an enlarged edition of the French work, in 1831. Kluber was the author of numerous other works connected with international jurisprudence. George William Frederick Hegel, a native of Stuttgart, (born 1770, died 1831,) was the author of a number of works on philosophy and law, in one of which he most ably refutes the political theories of Kant. His *Elements of Right, or the Basis of Natural Law and Political Science*, (*Grundeinien des Rechts, oder Naturrecht und Staatswissenschaft in Grundrisse*), was published at Berlin in 1821. Henry Wheaton, an American author,

(born 1785, died 1848,) published the first edition of his *Elements of International Law* in 1836. This work was afterward greatly enlarged and improved. He had previously written on the *Law of Captures*, and subsequently he published several important works on international jurisprudence. James Kent, another American writer, (born 1768, died 1847,) published, in 1826, the first volume of his *Commentaries on American Law*, which briefly, but most ably, discusses the fundamental principles of international law; the entire work was not completed till 1830. Joseph Story, one of the Justices of the Supreme Court of the United States, (born 1779, died 1845,) published, in 1834, his *Commentaries on the Conflict of Laws*, in which he examines many important questions of international jurisprudence. William Oke Manning, an English author, published, in 1839, his excellent work, entitled *Commentaries on the Law of Nations*. Andrés Bello, a native of Venezuela, published, in 1832, in Chili, a valuable and able elementary work, entitled *Principios del Derecho Internacional*. B. W. Pfeiffer published, in 1819, his *In Weisern sind Regenerungs-hundlungen*, etc., and in 1823-1841, his *Das Recht des Kregseroberung*, etc. These works are valuable for containing learned discussions of certain questions not treated of in other modern works on public law. Charles de Martens published, his *Manuel Diplomatique*, in 1822, his *Causes Celebres du Droit des Gens*, in 1827, and his *Guide Diplomatique*, in 1832. He is also the author of several other works. Count de Garden published, his *Traité Complet de Diplomatie*, in 1833. J. M. Pardessus, commenced, in 1828, the publication of his *Collection de Lois Maritimes*, but the entire work was not completed till 1845. The first two volumes was subsequently published separately, under the title of *Us et Coutumes de la Mer*. P. S. Boulay-Paty published, in 1821-3, his *Cours de Droit Commercial Maritime*. Count d'Hauterive, and Baron De Cussy, begun, in 1834, the publication of their *Recueil des Traités de Commerce*. Professor De Felice published, in 1830, his *Leçons de Droit de la Nature et des Gens*. Professor Cotelle published, in 1819, a volume, entitled *Droit de la Nature et des Gens*. Frederick Salfeld published, in 1833, his *Handbuch des Positiven Volkerrechts*, an elementary work of considera-

ble merit, The posthumous work of G. de Wal, entitled *Inleidning tot de Wetenschap van het Europeesche Volkeregt*, was published in 1835. M. Shafner's work, on the development of private international law, (*Entwuklung des Internationalen Privatrechts*,) was published in 1841. H. Ahrens' *Cours de Droit Naturel*, was first published in 1840; it soon passed through several editions, and was translated into various languages. M. S. F. Schoel published, in 1817 and 1818, his *Histoire Abrégée des Traités de paix*. Laget de Podio published, in 1826, his *Jurisdiction des Consuls de France*. Borel published, in 1831, an enlarged edition of his work, entitled *De l'Origine et des Fonctions des Consuls*, which originally appeared in Russia in 1807. The fourth volume of Alexander de Miltitz' *Manuel des Consuls*, appeared in 1839; the death of the author prevented the completion of the work. José Ribiera dos Santos, and José Feliciano de Castilho-Barreto published, in 1839, a valuable work in two volumes, entitled *Traité du Consulat*. Schmolz published, at Berlin, in 1817, his *Europaisches Volkerrecht*. Gagern published, at Lepsic, in 1840, a work, entitled *Critik des Volkerrechts*. Miruss published, at the same place, in 1838, his work, entitled *Das Seerecht*, &c. Pitkin's political and civil history of the United States was published in 1828.

Some of the historical writers of this period, in describing the political events of that which preceded, have discussed, incidentally, but with marked ability, some of the great questions of international law which grew out of the memorable wars following the French revolution. Among the historical writings of this character, we may mention those of Baron Jomini, Mathieu Dumas, Foy, Thiers, Clausewitz, Koch, Burlow, the Archduke Charles, Napier, Pelet, Guvion Saint-Cyr, Suchet, &c. The *Memoires* dictated by Napoleon at St. Helena to Gourgaud, Montholon and others, contain many striking remarks upon questions of international law which had been agitated in Europe during his reign. (*Wheaton, Hist. Law of Nations*, pp. 749-758; *Manning, Law of Nations*, pp. 39-56; *Phillimore, on Int. Law*, vol. 3, pp. 681, 685, notes; *Martens, Guide Diplomatique*, tome. 1., Bib. Dip.)

TENTH PERIOD — FROM THE TREATY OF WASHINGTON TO THE  
CIVIL WAR IN THE UNITED STATES, 1842–1861.

§ 32. Among the most important events which occurred in Europe during this period, we may mention the revolution in France, which resulted in the expulsion of the younger house of the Bourbons, the restoration of the family of the Bonapartes, and the establishment of the imperial government of Napoleon III.; the abortive attempts at insurrection and revolution in Italy; the revolt in Hungary and the complete subjugation and absorption of that nation by Austria, through the assistance and armed intervention of Russia; the Crimean war between Russia on one side, and France, Great Britain, Sardinia and the Porte on the other; the Italian war between Austria and the allied forces of France, and Sardinia, and its appendix, the revolution and consolidation of Italy.

The wars waged by France in Africa, by Russia in Asia, by Great Britain in India, and by France and Great Britain in China and Syria, and by Spain against Morocco, do not properly come within the limits of this historical sketch. In America the most noted events were the revolt of Texas from Mexico and its voluntary annexation to the United States, and the war which resulted therefrom between the two republics. This war was terminated by the treaty of Guadalupe Hidalgo in 1848, by which Mexico ceded to the United States a large portion of her territory. The restoration of peace was followed by the disbanding of large bodies of undisciplined troops, whose restless spirits, under the leadership of designing and unprincipled men, sought occupation in the lawless and disastrous expeditions, which were fitted out in different parts of the United States against Cuba, Lower California, Sonora and Nicaragua, generally known by the name of *Filibuster Expeditions*. (*Presidents' Messages and Cong. Documents, on the War with Mexico*; *Alison, Hist. of Europe*, second series; *Capefigue, Depuis Louis Philippe*, etc.)

§ 33. The more important questions of international law agitated during this period in America were, the right of jurisdiction over arms of the sea, arising out of the fishery

question on the northeastern coast adjacent to the British and American possessions; the rights of secession and annexation, as in the case of Texas; the rights of military occupation and of conquest, as in the case of Mexican ports and in territories possessed by, and ceded to the United States; the rights of neutrality and of embassy, as in the case of British enlistments in the United States, and the consequent dismissal of the British minister and consuls; the character of unauthorised military expeditions by citizens of one state against those of another, when the governments of the two countries are at peace with each other, as in the case of the various filibuster expeditions upon Cuba, Mexico and Central America; the proposed treaty for the protection of Cuba, and a guarantee by Great Britain, France and the United States, of the *status quo* in the West Indies; thus introducing into America the principle of supervision, intervention, and balance of power, which now prevails in Europe; and the right of intervisitation of ships on the high seas in time of peace, for the suppression of the slave trade. (*Philimore, On Int. Law*, vol. 1, pp. 465–466; *Marcy, Dip. Correspondence, Cong. Docs.*; *Everett, Letter of Dec. 1st, 1852, Cong. Docs.*; *President's Messages, Dec. 1856–57–58*; *Wheaton, Elem. Int. Law*, pt. 2, ch. 1, § 3, note.)

§ 34. The questions of international law most agitated during this period in Europe were those respecting the right of armed intervention by one state in the internal affairs of another, arising out of the revolutions in France, Italy, Germany and Hungary; the preservation of the balance of power in Europe, arising out of the encroachments of Russia upon the territory of the Ottoman Porte, and her manifest intention to enlarge her dominions by the absorption of Turkey; and similar encroachments of Austria in Italy; the law of sieges and blockades, the rights and duties of neutrals, the question of contraband, of neutral goods in enemy ships, and of enemy goods in neutral ships, arising out of the war of the Crimea between Russia and the western powers; the right of foreign enlistment in neutral territory and of the rights and duties of embassy, as in the case of the British minister and consuls in the United States, and of the British minister in Spain; the abolition of privateering, and the

general policy of changing the conventional law of nations with respect to maritime capture, so as to conform to the modern rules of war upon land, as proposed by the United States to the maritime states of Europe; the rights of belligerents on land, and of conquest, as in the Italian war, and the cession to France and transfer to Sardinia of Lombardy; and the rights of other sovereign and dependent states of Italy, as connected with the right of intervention and the equilibrium of power in Europe. (*Phillimore, on Int. Law*, vol. 3, pref.; *Marcy, Letter to Count Sartiges Cong. Doc*; *Wheaton, Elem. Int. Law*, pt. 1, ch. 2, § 11, note; *Webster, the works of*, vol. 6, pp. 488-506.)

§ 35. The present period has been exceedingly prolific in works which are professedly devoted to international law, or which treat of subjects connected with that branch of legal science. We will proceed to mention some of the more important of these publications.

Henry Wheaton published, in 1842, his essay on the *Right of Visitation and Search*, and, in 1845, his *History of the Law of Nations*, based on a memoir previously published in French, and submitted to the Institute of France. James Reddie published, in 1842, his *Inquiries in International Law*, and subsequently, his *Researches Historical and Critical in Maritime International Law*. Archer Polson, in 1848, published a work, entitled *Principles of the Law of Nations*. Richard Wildman published, in 1849, a valuable work, entitled *Institutes of International Law*. John Westlake published, in 1858, a most excellent *Treatise on Private International Law*. Wm. Beach Lawrence published, in 1855, an edition of Wheaton's *Elements of International Law*, with introductory remarks and valuable notes, and in 1859, an *Essay or historical sketch of the right of Visitation and Search*. Robert Phillimore published, in 1847, a valuable little work, entitled *The Laws of Domicil*, and in 1854-6, his learned and elaborate treatise, entitled *Commentaries of International Law*. George Bowyer published, in 1854, his *Commentaries on Universal Public Law*, in which many questions of international law are fully discussed. Of continental works, we may mention the following: L. B. Hautefeuille published, in 1848, his valuable work, entitled *Droits et Devoirs des Nations Neu-*

*tres en Temps de Guerre Maritime.* A second and enlarged edition was published in 1858. Theodore Ortolan published, in 1845, *Règles Internationales et Diplomatie de la Mer.* Eugene Ortolan published, in 1845, *Des Moyens d'acquérir le Domine International.* Faelix published, in 1848, his *Traité du Droit International Privé.* G. Massé published, in 1844, his work, entitled *Le Droit Commercial*, etc. A. de Pistoye, and Charles Duverdy, published, in 1855, their elaborate work, entitled *Traité des Prises Maritimes.* Baron Ferdinand De Cussy, published his *Dictionnaire du Diplomate et du Consul*, in 1846; his *Règlements Consulaires*, in 1851; his *Phases et Causes Célèbres du Droit Maritime des Nations*, in 1856; and his *Precis Historique des Evenements Politiques*, in 1859. Louis Pouget published, in 1858, *Principes de Droit Maritime*; and the same year, Aldrick Caumont, published his *Dictionnaire Universel du Droit Maritime.* J. Bedarride, published his *Droit Commercial* in 1859. Two Spanish works, published during this period, are worthy of particular notice. The posthumous works of José Maria de Pando, who died in 1840, was published at Madrid in 1843, under the title of *Elementos del Derecho Internacional*, and, in 1849, Don Antonio Riquelme published his *Elementos del Derecho Publico Internacional.* Silvestre Pinheiro-Ferreira, a Portuguese by birth, published, in 1845, his *Cours du Droit Public.* He was the author of numerous articles in the French *Revue Etrangère de Legislation*, and of notes on Vattel and Martens. The various memoirs of Professor Putter, of the University of Griveswalde, on questions of international law, were collected and published in 1843, under the title of *Beitrage zur Voelkerrechts Geschichte und Wissenschaft.* A. W. Heffter published, in 1844, a work on international law, entitled *Das Europaëche Voelkerrecht der Gegenwart.* An enlarged edition, translated by Jules Bergson, with notes, was published, in Paris in 1859, under the title of *Le Droit International Public de L'Europe.* Mensch published, in 1846, his *Manuel practique du Consulat*, and Moreuil, in 1850, his *Manuel des Agents Consulaires.* Alexander de Clercq published, in 1851, a *Guide practique du Consulat*, which was followed by a *Formulaire des Chancelleries.* Count de Garden commenced, in 1850, the publication of his voluminous work,



entitled *Histoire Général des Traités de Paix*. C. Von Kallernborn published, in 1847, a work, entitled *Critik des Volkerrechts*, and, in 1848, another, entitled *Zur Geschichte des Natur und Volkerrechts*. A. Villefort's pamphlet on *Privilèges Diplomatiques*, published in 1858, is a work of much merit. A French edition of the Italian work of Ferdinand Lucchesi-Palli, was published in 1842, under the title of *Principes du Droit Public Maritime*. H. B. Oppenheim published, at Frankfort, in 1845, a manuel on international law, entitled *System des Volkerrechts*. Mirus published, in 1847, a work, entitled *Das Europ. Gesandtschaftsrecht*. Gardner published, in 1860, his *Institutes of International Law*. Other authors of treatises on particular branches of jurisprudence,—as insurance, commercial and merchantile law,—have incidentally discussed certain questions of an international character with learning and ability. Among these we may mention *The Law and Practice of Maritime Insurance*, by John Duer, published in 1846, which contains a very complete summary of the decisions of the prize courts of England and America on maritime captures. Of the judicial opinions collected and discussed in Mr. Duer's work, there are none of more marked ability than those delivered by Chief Justice Marshall and Mr. Justice Story in the Supreme and Circuit Courts of the United States. The decisions of these two eminent judges on questions of international law, and more particularly of maritime capture, rank, at least, next to those of Sir Wm. Scott, and on some points, they are now regarded as the better authority. (*Wheaton, Elm. Int. Law, Introduction by Lawrence; Martens, Guide Diplomatique*, tom. 1, Bib. Dip.; *De Cussy, Droit Maritime*, liv. 1, tit. 3, § 39; *Faelix, Revue de Legislation*.)

§ 36. Some of the numerous and important questions of international law, which have been agitated within the last twenty years, are treated of in the text books to which we have just referred; but many of them are scarcely alluded to, and some are not mentioned at all. There has not yet been sufficient time for a systematic examination and analysis of the various events of the Crimean and Italian wars, and of the particular questions to which they have given rise; but we find some able and valuable discussions of these

questions in the diplomatic correspondence and parliamentary debates of the same period. In fact, international law has been very much popularized in the present age; its principles are more generally acknowledged, and its authority is more frequently invoked by diplomatists, statesmen and legislators. This is especially the case in the United States and Great Britain. In proof of the remark, we need only refer to the admirable state papers of the American Secretaries, Webster and Marcy, and to the more recent debates by Lyndhurst, Palmerston, Russell and others in the British Parliament, on the rights and duties of neutrals, the law of allegiance and protection, the right of intervention, the maritime right of intervisitation in time of peace, etc. The diplomatic papers of Napoleon III., on Italian affairs, are most able productions.

**EXPLANATORY NOTE.**—It is proper to remark that, with regard to the dates of the births, deaths and publications of many of the authors referred to in the foregoing pages, there are numerous conflicting statements in biographical and bibliographical dictionaries. The author has followed those which he believed the best authority, although, in a few cases, there was some cause to doubt their correctness.

## CHAPTER II.

## NATURE AND SOURCES OF INTERNATIONAL LAW.

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§ 1. International law, or The law of nations, may be defined to be, *The rules of conduct regulating the intercourse of states.*

Most writers have endeavored to frame their definition so as to embrace the sources of this law, rather than to describe the nature and character of the law itself. Thus, Grotius considers the law of nations as a positive institution, deriving its authority from the positive consent of all, or the greater part of civilized nations, united in a social compact for this purpose. While Rutherford denies the existence of any

such social union among nations, and concludes that what is called the law of nations, when applied to states, is nothing more than what is called natural law when applied to individuals as parts of these collective bodies. Hobbes and Puffendorf also consider the general principles of natural law, and the law of nations, as one and the same thing, and the distinction between them as merely verbal, while others define this law to consist only of the usages, customs and conventions adopted and observed among nations. The definition here given avoids any reference to those questions which have been so much discussed by publicists, and upon which there is very little prospect of a general agreement. (*Vattel, Droit des Gens, Prelim.*, § 3; *Wheaton, Elem. Int. Law*, pt. 1, ch. 1, § 11; *Bentham, Morals and Leg.*, vol. 2, p. 256; *Fœlix, Droit Int.*, tit. pre., ch. 1, § 1; *Polson, Law of Nations*, p. 1; *Manning, Law of Nations*, pp. 2, 57–58; *Hautefeuille, Des Nations Neutres*, tome 1, p. 3; *D'Auguesseau, Oeuvres*, tome 1, p. 337; *Savigny, Rom. Rechts*, B. 1. K. 2, § 11; *Wildman, Int. Law*, vol. 1, p. 1; *Bowyer, Un. Pub. Law*, ch. 2; *Massé, Droit Int.*, § 1; *Bello, Derecho, Int.*, No. Prel. § 1; *Riquelme, Derecho, Pub. Int.*, lib. 1, tit. 1, § 1; *Phillimore, on Int. Law*, vol. 1, § 9; *Omyteda Literatur des Volkerrechts*, § 64; *Rayneval, Droit de la Nat., etc.*, liv. 1. ch. 1, § 10; *Ortolan Dip. de la Mer*, liv. 1, ch. 4; *Garden, De Diplomatie*, tome 1, p. 36; *Marten's Precis du Droit des Gens*, § 2; *Real, Science du Gouvernement*, tome 1, p. 22.)

§ 2. The rules which ought to regulate the conduct of nations in their mutual intercourse are undoubtedly deduced, in part, from reason and justice, and from the nature of society existing between independent states or bodies politic; and, in part, from usage, and the agreements or compacts entered into between different nations. This difference in the nature and origin of these rules has led text writers to divide international law into different branches. The most common of these general divisions is, into the natural law of nations, and the positive law of nations. The first of these branches has been sub-divided into the divine law, and the application of the law of God to states. The second branch has also been sub-divided into the conventional law

of nations, and the customary law of nations. These divisions are somewhat arbitrary, and we shall follow them only so far as may be necessary or convenient in pointing out the sources of international jurisprudence, and in discussing the nature and character of the rules which constitute that code. (*Wheaton, Elem. Int. Law*, pt. 1, ch. 1, §§ 9–11; *Vattel, Droit des Gens, Prelim.*, §§ 22–28; *Heffter, Droit International*, § 2; *Pinheiro-Ferreira, Notes sur Vattel*, tome 3, p. 22; *Wolfius, Jus Gentium, Proleg.*, § 3; *Wildman, International Law*, vol. 1, pp. 2, 3; *Polson, Law of Nations*, sec. 1; *Manning, Law of Nations*, p. 57; *Bello, Derecho Internacional*, No. Prel. § 1; *Riquelme, Derecho Publico Int.*, lib. 1, tit. 1, sec. 1; *Martens, Precis du Droit des Gens*, §§ 5 et seq.; *Massé, Droit Commercial*, liv. 1, tit. 2, ch. 1.)

§ 3. By the divine law, we understand the rules of conduct prescribed by God to his rational creatures, and revealed by the light of reason, or the sacred scriptures. "Natural law," says Grotius, "is the dictate of right reason, pronouncing that there is in some actions a moral obligation, and in other actions a moral deformity, arising from their respective suitability or repugnance to the rational and social nature, and that, consequently, such actions are either forbidden or enjoined by God, the author of nature. Actions which are the subject of this exertion of reason are in themselves lawful or unlawful, and are, therefore, as such, necessarily commanded or prohibited by God." In other words, there is a law of conscience, enjoining some actions and prohibiting others, according to their respective suitability or repugnance to the law of reason and the sacred scriptures. Ethical writers distinguish between the principles of eternal justice, implanted by God in all his moral and social creatures, and the revealed will of God enforcing and extending these principles. But the examination and discussion of these distinctions belong to ethical science rather than international jurisprudence. (*Wheaton, Elem. Int. Law*, pt. 1, ch. 1, §§ 2, 3; *Grotius, de Jur. Bel. ac Pac.*, lib. 1, cap. 1, § 10; *Paley, Moral and Pol. Philosophy*, b. 2, chs. 4 et seq.; *Phillimore, On Int. Law*, vol. 1, §§ 17 et seq.; *Dymond, Prin. of Morality*, essay 1, chap. 6, § 1; *Manning, Law of Nations*, p. 57;

*Bowyer, Universal Public Law*, ch. 3, pp. 41 et seq.; *Heffter, Droit International*, § 2; *Massé, Droit Commercial*, liv. 1, tit. 2, ch. 1.)

§ 4. But as this divine law, which God has prescribed to his rational creatures, whether revealed by the light of reason or the sacred scriptures, was evidently intended for the rules of conduct of individuals living together in a social state, it necessarily requires explanations and modifications when applied to the conduct of independent communities. Hence the law of nations has been distinguished from the natural or divine law; the former including the rules for the application of natural law to independent states, which rules have been established by the great body of these communities for the promotion of their general utility, rather than that of a particular state. This view is opposed by Hobbes and Puffendorf, who consider the precepts to be the same, whether applied to individuals or states, and that the same law, "which, when speaking of individual men, we call the law of nature, is called the law of nations when applied to whole states, nations or people." The distinction drawn by Grotius is, perhaps, not very obvious, and is of little or no practical importance. (*Wheaton, Elem. Int. Law*, pt. 1, ch. 1, § 4; *Grotius, de Jure Bel. ac Pac., Proleg.*, §§ 13–18; *Puffendorf, de Jur. Nat. et Gent.*, lib. 2, cap. 3, § 23; *Hobbes, De Cive*, cap. 14, § 4; *Leibnitz, de Usu Act. Pub.*, § 13; *Cumberland, De Legibus Naturalibus*, cap. 5, § 1; *Bentham's Works, Morals and Legislative*, pt. 8, p. 537; *Polson, Law of Nations*, § 1; *Bowyer, Universal Public Law*, ch. 3, et seq.)

§ 5. Nor, indeed, is the definition of either Grotius or his opponents at all satisfactory; for international law, as understood in the present age, is something more and other than natural or divine law, applied to the conduct of independent states, considered as moral beings; and in order to determine what is the rule to be observed among nations in any particular case, it is not sufficient to inquire what would be the natural law in a similar case, when applied to individual persons. "The application of a rule," says Vattel, "cannot be reasonable and just, unless it is made in a manner suitable to the subject. We are not to imagine that the law of nations

is precisely and in every case the same as the law of nature, with the difference only in the subjects to which it is applied, so as to allow of our substituting nations for individuals. A state or civil society is a subject very different from an individual of the human race ; from which circumstance, pursuant to the law of nature itself, there result, in many cases, very different obligations and rights ; since the same general rule, applied to two subjects, cannot produce exactly the same decisions when the subjects are different ; and a particular rule which is perfectly just with respect to one subject, is not applicable to another subject of quite a different nature. There are many cases, then, in which the law of nature does not decide between state and state in the same manner as it would between man and man. We must, therefore, know how to accommodate the application of it to different subjects ; and it is the art of applying it with a justness founded on right and reason that renders the law of nations a distinct science."

Again, as individuals adopt positive human institutions for their government, so states are capable of contracting obligations toward others, either by their general acquiescence in certain positive rules for the regulation of their mutual intercourse, by that tacit convention implied from usage and practice, or by direct and positive compact or agreement. These, where not contrary to the law of nature, are binding rules of conduct, and must be inquired into before we can determine what is the rule to be observed by such states in any particular case. Hence arises that important branch called *the positive law of nations*, which has been subdivided into the *conventional law of nations* and the *customary laws of nations*. ( *Vattel, Droit des Gens*, prelim., § 6 ; *Wheaton, Elem. Int. Law*, ch. 1, § 9 ; *Grotius, de Jur. Bel. ac. Pac.*, lib. 1, cap. 1, § 14 ; *The Flod Oyen*, 1 *Rob. Rep.*, p. 140 ; *Polson, Law of Nations*, § 1 ; *Wildman, Int. Law*, vol. 1, ch. 1 ; *Manning, Law of Nations*, p. 67 ; *Massé, Droit Commercial*, liv. 1, tit. 2, ch. 1 ; *Martens, Precis du Droit des Gens*, §§ 5, et seq ; *Heffter, Droit International*, §§ 1-4 ; *Ortolan, Diplomatie de la Mer*, liv. 1, ch. 4.)

§ 6. The relation between the two great branches of international law,—the natural, and the positive law of na-

tions,—is thus stated by a recent writer on this subject. “The necessity,” says Phillimore, “of mutual intercourse, is laid in the nature of states, as it is of individuals, by God who willed the state and created the individual. The intercourse of nations, therefore, gives rise to international rights and duties, and these require an international law for their regulation and enforcement. That law is not enacted by the will of any common superior upon earth, but it is enacted by the will of God; and it is expressed in the consent, tacit or declared, of independent nations. The law which governs the external affairs, equally with that which governs the internal affairs of states, receives accessions from custom and usage, binding the subjects of them as to things which, previous to the introduction of such custom and usage, might have been in their nature indifferent. Custom and usage, moreover, outwardly expresses the consent of nations to things which are *naturally*, that is, by the law of God, binding upon them. But it is to be remembered, that in this latter case, usage is the effect and not the cause of the law.” (*Phillimore, on International Law*, vol. 1, preface; *Wheaton, Elements Int. Law*, part 1, ch. 1, § 6; *Bynhershoek, Quaest. Jur. Pub.*, lib. 1, cap. 10; *Bynhershoek, de Foro Legatorum*, cap. 3, § 10, cap. 7, § 8; *Rutherford, Institutes*, vol. 1, ch. 3, §§ 1–6; *Manning, Law of Nations*, pp. 67–69; *Martens, Precis du Droit des Gens*, §§ 5–6; *Bowyer, Universal Public Law*, ch. 4; *Cotelle, Droit des Gens*, pt. 1, et seq.; *Ortolan, Diplomatie de la Mer*, liv. 1, ch. 4.)

§ 7. *The Conventional Law of Nations* results from the stipulations of treaties, and consists of the rules of conduct agreed upon by the contracting parties. As such agreement binds only the contracting parties, it is evident that the conventional law of nations is not an universal, but a particular law. Nevertheless, as these agreements are not always limited to the intercourse of the contracting parties with each other, but extend to their intercourse with other nations, and are, moreover, frequently intended to express opinions or to establish rules of action, with respect to particular points or questions in the law of nations, they belong to history, and have an important influence in regulating the general inter-



course of states, and in modifying and determining the principles of international law. Hence the stipulations of treaties between highly civilized nations form an important branch of the general law of nations. (*Wheaton, Elem. Int. Law*, pt. 1, ch. 1, § 9; *Vattel, Droit des Gens*, prelim., § 24; *Wolfius, Jus Gentium*, proleg., 325; *Polson, Law of Nations*, § 1; *Manning, Law of Nations*, pp. 74-75; *Bello, Derecho Internacional*, No. Prel., § 5; *Riquelme, Derecho Pub. Int.*, liv. 1, tit. 1, ch. 1; *Heffter, Droit International*, § 5; *Wildman, Int. Law*, vol. 1, ch. 1; *Ortolan, Diplomatie de la Mer*, liv. 1, ch. 4.)

§ 8. *The customary law of nations* embodies, says Mr. Justice Story, "those usages which the continued habit of nations has sanctioned for their mutual interest and convenience." As this law is founded on the tacit or implied consent of nations as deduced from their intercourse with each other, in order to determine whether any particular act is sanctioned or forbidden by this law, we must inquire whether it has been approved or disapproved by civilized nations generally, or at least by the particular nations which are effected in any way by the act. (*Wheaton, Elem. Inter. Law*, pt. 1, ch. 1, § 9; *Story, Miscel. Writings*, p. 536; *Vattel, Droit des Gens*, prelim., § 25; *Heffter, Droit International*, § 5; *Bello, Derecho Internacional*, No. Prel., § 5; *Wildman, International Law*, vol. 1, ch. 1; *Polson, Law of Nations*, sec. 1; *Manning, Law of Nations*, pp. 67 et seq.; *The Herstelder*, 1 Rob. Rep., p. 115.)

§ 9. Customs which are lawful and innocent are binding upon the states which have adopted them; but those which are unjust and illegal, and in violation of natural and divine law, have no binding force. "When a custom is generally established," says Vattel, "either between all the civilized nations of the world, or only between those of a certain continent, as of Europe for example, or between those which have most frequent intercourse with each other; if that custom is in its own nature indifferent, and much more if it be useful and reasonable, it becomes obligatory on all the nations in question, which are considered as having given their consent to it, and are bound to observe toward each other, as long as they have not expressly declared their resolution of not observing it in future. But if that custom contains anything

unlawful or unjust, it is not obligatory; on the contrary, every nation is bound to relinquish it, since nothing can oblige or authorize a violation of the law of nature."

The foregoing remark of Vattel, that the customary law of nations may be varied or abandoned at pleasure, such variation or abandonment being previously notified, must be limited to the peculiar customs of particular states in their intercourse with other nations, and cannot be applied to general law, or what he calls the voluntary law of nations, which is founded on general usage or implied consent, as described in the next paragraph. (*Vattel, Droit des Gens*, prelim., § 26; *Martens, Precis du Droit des Gens*, § 6; *Wildman, International Law*, vol. 1, ch. 1; *Manning, Law of Nations*, pp. 61-73; *Fennings vs. Lord Grenville*, 1 Taunton Rep., p. 246.)

§ 10. Wolfius, and his abridger, Vattel, distinguish between particular and general usages, and confine the term *customary* to the former, and introduce a third division of the positive law of nations, which they call *the voluntary law of nations* to designate that universal voluntary law of usage, or of custom, which has been established and sanctioned by the frequency of its recognition and the numbers who have approved it. From this sub-division they would exclude all usages which are confined to particular periods or to particular nations and countries. (*Vattel, Droit des Gens*, prelim., §§ 25-27; *Wolfius, Jus Gentium*, proleg. § 25; *Wheaton, Elem. Int. Law*, pt. 1, ch. 1, § 9, first edition, § 13; *Chitty, Com. Law*, pp. 28, 29; *Wildman, Int. Law*, vol. 1, ch. 1; *Wheaton, Hist. Law of Nations*, p. 139; *Bello, Derecho Internacional*, No. Prelim. § 4.)

§ 11. This division of the positive law of nations, by Vattel, into voluntary, conventional, and customary laws, has been objected to by some as improper, and calculated to confuse rather than to elucidate the subject. It was adopted by Wheaton in the first edition of his elements of international law, but afterward rejected by him on the ground that the term "voluntary law of nations," more properly designated the *genus*, including all the rules introduced by positive consent, for the regulation of international conduct, and should be divided into two *species*,—conventional law and customary

law,—the former being introduced by treaty, and the latter by usage; the former by express consent, and the latter by tacit consent between nations. Notwithstanding this objection, we think the divisions of Vattel not entirely without foundation, and, at least, as worthy of consideration. His terms, however, are not well chosen. (*Pinheiro Ferreira, Notes sur Vattel*, tom. 3, p. 22; *Wheaton, Elm. Int. Law*, pt. 1, ch. 1, § 9, first edition, § 13; *Wheaton, Hist. Law of Nations*, p. 189; *Wildman, Int. Law*, vol. 1, p. 33.)

§ 12. Other publicists have made still further and different divisions and subdivisions of this branch of international jurisprudence. Of these we shall mention but one, which not only seems to be well founded, but to point out distinctions which it is important to observe. The custom and usage of nations have established certain rights which are called *absolute*, or rights *stricti juris*, while, at the same time, increasing civilization has, in other respects, mitigated the severity of these rights by the *usage of comity*,—*comitas gentium*,—by which is understood, the rule of convenience, as distinguished from abstract right. Again, with regard to the intercourse of *individual* members of different states, this comity has produced what is termed *international law private*,—*jus gentium privatum*,—as distinguished from *international law public*; that is to say, rules having reference, not to the relations of states among themselves, but the relations of individuals of one state to the laws and institutions of other states. (*Phillimore, On Int. Law*, vol. 1, §§ 140, 141; *Fœlix, Droit Int. Privé*, tit. prel. chs. 1, 3; *The Maria*, 1 *Rob. Rep.*, pp. 367, 368, 376; *Cushing, Opin. of U. S. Att'ys. Genl.*, vol. 7, p. 18; *Martens, Précis du Droit des Gens*, §§ 3–5; *Bowyer, Universal Public Law*, ch. 4; *Massé, Droit Commercial*, etc., tome 1, § 45; *Westlake, Private Int. Law*, ch. 1, § 1; *Heffter, Droit International*, § 2.)

§ 13. It is admitted by all, that there is no universal or immutable law of nations, binding upon the whole human race, which all mankind in all ages and countries have recognized and obeyed. Nevertheless, there are certain principles of action, a certain distinction between right and wrong, between justice and injustice,—a certain divine or natural law,—or rule of right reason, which, in the words of Cicero,

"is congenial to the feelings of nature, diffused among all men, uniform, eternal, commanding us to our duty, and prohibiting every violation of it,—one eternal and immortal law, which can neither be repealed nor derogated from, addressing itself to all nations and all ages, deriving its authority from the common sovereign of the universe, seeking no other law-giver and interpreter, carrying home its sanctions to every breast, by the inevitable punishment he inflicts on its transgressors."

It is to these principles, or rule of right reason, or natural law, that all other laws, whether founded on custom or treaty, must be referred, and their binding force determined. If in accordance with the spirit of this natural law, or if innocent in themselves, they are binding upon all who have adopted them; but if they are in violation of this law, and are unjust in their nature and effects, they are without force. The principles of natural justice, applied to the conduct of states, considered as moral beings, must therefore constitute the foundation upon which the customs, usages, and conventions of civilized and christian nations, are erected into a grand and lofty temple. The character and durability of the structure must depend upon the skill of the architect, and the nature of the materials; but the foundation is as broad as the principles of justice, and as immutable as the law of God. (*Wheaton, Elem. Int. Law*, pt. 1, ch. 1, § 10; *Montesquieu, Esprit des Lois*, liv. 1, ch. 3; *Ward, Hist. Law of Nations*, vol. 1, ch. 1; *Grotius, de Jur. Bel. ac Pac.*, lib. 1, cap. 1, § 14; *Leibnitz, Juris. Gent.*, pref.; *Manning, Law of Nations*, p. 59; *Martens, Precis du Droit des Gens*, § 9; *Bowyer, Universal Public Law*, chs. 5, 7; *Mackintosh, Miscellaneous Works*, p. 183.)

§ 14. It must not be inferred, that because there is no immutable law of nations absolutely binding upon all mankind, that the rules of international intercourse established by general consent and sanctioned by reason, are not obligatory upon states and may be violated with impunity. These rules cannot, perhaps, with strict propriety be called *laws*, in the sense of commands proceeding from an authority competent in all cases to enforce obedience or punish violations. But, like the *laws of honor*, they are rules of conduct imposed by public opinion, and are enforced by appropriate sanctions.

They are, therefore, by their analogy to positive commands, properly termed *laws*; and they are enforced, not only by moral sanctions, but by the fear of provoking general hostility, and incurring its evils, in case of violating maxims which are generally received and respected among nations. (Wildman, *International Law*, vol. 1, p. 32; Polson, *Law of Nations*, § 4; Wheaton, *Elements Int. Law*, pt. 1, ch. 1, § 10; Bentham, *Morals and Legislation*, vol. 2, p. 256; Austin, *Province of Jurisprudence*, pp. 147, 207; Manning, *Law of Nations*, p. 4; Sedgwick, *On Stat. and Con. Law*, pp. 222–223; Bello, *Derecho Internacional*, No. Prel., § 4; Heffter, *Droit International*, § 2.)

§ 15. Moreover, the law of nations provides, in a measure, for the enforcement of its rules, and the punishment of a violation of its maxims. Certain offences against this law, as piracy for example, wheresoever and by whomsoever committed, are within the cognizance of the judicial power of every state; for, being regarded as the common enemies of all mankind, any one may lawfully capture pirates upon the high seas, and the tribunals of any state, within whose territorial jurisdiction they may be brought, can try and punish them for their crimes. And in case of smaller offences, where the accused must be sent to the tribunals of his own country for trial, or where other states can exercise no jurisdiction whatever, the moral obligation of a state to punish its subjects for offences against international law is so strong that no one can habitually neglect to do so with impunity. A state which should openly violate, or permit its subjects to violate, the well established and generally received maxims of this law, would not only lose its standing among nations, but would provoke universal reprobation and hostility. (*Philimore, On Int. Law*, vol. 1, § 353; *Wheaton, Elem. Int. Law*, pt. 2, ch. 2, § 15; *Wildman, Int. Law*, vol. 1, p. 32; *Polson, Law of Nations*, § 4; *Manning, Law of Nations*, p. 76.)

§ 16. Publicists have discussed the question whether states are liable to *punishment* for offences against international law. While all admit that these bodies politic are capable of rights and liable to obligations, some contend that they can never be subjects of *criminal law*, and, therefore, that no punishment can be inflicted on them for offenses committed. It is

probably true that states cannot be *punished*, in the strict technical sense of that term. Nevertheless, if one state be injured or insulted by another, it may seek redress by war, and require not only indemnity for the past, but security for the future; and in order to attain this object, it may destroy the property of the offending state and take away its territory. These acts are not, in the strict sense of that term, acts of punishment, but, directly or indirectly, acts of self defense; and the state which resorts to such measures against another, can justify its conduct only on the ground of their being necessary, for the preservation of its own rights, the welfare of other states, or the peace of the world. They are not defensible as punishments due and inflicted upon the offender, for one state has no authority to punish the offenses of another. Nevertheless, they are, with respect to the offending state, to all intents and purposes, *punishments*. (*Vattel, Droit des Gens*, liv. 2, ch. 1, § 4; *Phillimore, On Int. Law*, vol. 1, § 11; *Pinheiro Ferreira, Com. sur Vattel, verb punir*; *Savigny, System des Rom. Rechts*, B. 2, pp. 94–96; *Wildman, Int. Law*, vol. 1, p. 32.)

§ 17. In the present imperfect state of international law, which recognizes the obligatory force of no written code, and acknowledges no permanent judicial expositor of its principles, we must necessarily resort to the precedents collected from history, the opinions of juriconsults, and the decisions of tribunals, in order to ascertain what these principles are, and to determine what are the proper rules for their application. Some of these principles and rules have been settled for ages, and have the force of positive laws which no one will now venture to dispute or call in question; while others are admitted only by particular states, and cannot be regarded as binding upon any one which has not adopted them. The sources of international law are therefore as various as the subjects to which its rules are applied; and, in deducing these rules, we should distinguish between those which are applicable only to particular states, and those which are obligatory upon all. We will now proceed to point out some of these sources, and to discuss their character and authority. (*Wheaton, Elem. Int. Law*, pt. 1, ch. 1, § 10; *Wildman, International Law*, vol. 1, p. 32; *Manning, Law of Nations*, p. 76;

*Bello, Derecho Internacional*, No. Prel., § 32; *Heffler, Droit International*, § 2; *Vattel, Droit des Gens*, prel. § 1, Chitty's note; *Austin, Prov. of Jurisprudence*, pp. 147, 148, 207, 208.)

§ 18. The first source from which are deduced the rules of conduct which ought to be observed between nations, is the *divine law*, or principle of justice, which has been defined "a constant and perpetual disposition to render every man his due." The peculiar nature of the society existing among independent states, renders it more difficult to apply this principle to them than to individual members of the same state; and there is, therefore, less uniformity of opinion with respect to the rules of international law properly deducible from it, than with respect to the rules of moral law governing the intercourse of individual men. It is, perhaps, more properly speaking, the test by which the rules of positive international law are to be judged, rather than the source from which these rules themselves are deduced. (*Justinian, Institutes*, lib. 1, tit. 1; *Phillimore, On Int. Law*, vol. 1, § 23; *Dymond, Prin. of Morality, Essay 1*, pt. 2, ch. 4; *Manning, Law of Nations*, pp. 57-58; *Cotelle, Droit des Gens*, pt. 1; *Heineccius, Elementa Juris Nat. et Gent.*, lib. 1, cap. 1, § 12.)

§ 19. Grotius lays down the broad principle that the positive law of nations may *add to*, but cannot *subtract* from the law of nature. "Nimirum humana jura multa constituere possunt *praeter naturam, contra nihil*." Voet, Suarez and Wolfius express themselves to the same effect. Burke says: "All human laws are, properly speaking, only declaratory. They may alter the mode and application, but have no power over the substance of *original justice*." Mackintosh says: "The duties of men, of subjects, of princes, of lawgivers, of magistrates, and of *states*, are all parts of one consistent system of universal morality. Between the most abstract and elementary maxim of moral philosophy, and the most complicated controversies of civil or public law, there subsists a connection. *The principle of justice*, deeply rooted in the nature and interest of man, pervades the whole system, and is discoverable in every part of it, even to its minutest ramification in a legal formality, or in the construction of an article in a treaty." Vattel considers "*justice as the basis of all society*;" and that, although natural law cannot decide

between nation and nation, as it would between individual and individual, yet the rules of international law must be according to *justice*, founded on *right reason*. (*Phillimore, On Int. Law*, vol. 1, § 35; *Grotius, de Jur. Bel. ac Pac.*, lib. 2, cap. 6, § 6; *Voet, Comm. ad Pand.*, lib. 1, § 19; *Suarez, De Legibus, etc.*, lib. 2, cap. 20, § 8; *Wolfius, Juris Gentium*, § 163; *Vattel, Droit des Gens*, liv. 2, chap. 5, § 63; *Heffter, Droit International*, § 2; *Mackintosh, Miscellaneous Works*, p. 183.)

§ 20. The *history* of transactions relating to the intercourse of states, both in peace and war, is one of the most fruitful sources of international law. What is called the voluntary, or positive law of nations, is mainly derived from usage and custom, and to determine these we must have recourse to the history of what has passed from time to time among the several nations of the world; not that history will afford us the record of any constant and uninterrupted practice, but because we shall there find what has been generally approved and what has been generally condemned in the variable and contradictory practice of nations; “for,” in the words of Grotius, “such a universal approbation must arise from some universal principle, and this universal principle can be nothing else but the common sense or reason of mankind.” (*Grotius, de Jur. Bel. ac Pac.*, lib. 1, cap. 1, § 12; *Wheaton, Elem. Int. Law*, pt. 1, ch. 1, § 4; *Rutherford, Institutes*, b. 1, ch. 9, §§ 1–6; *Phillimore, On Int. Law*, vol. 1, §§ 49 et seq.; *Polson, Law of Nations*, § 3; *Heffter, Droit International*, §§ 6–9.)

§ 21. It will generally be found that the deficiencies of precedent, usage, and express international authority, may be supplied from the rich treasury of the *Roman Civil Law*. Indeed, the greater number of controversies between states would find a just solution in this comprehensive system of practical equity, which furnishes principles of universal jurisprudence, applicable alike to individuals and to states. “Although,” says Wiseman, “the civil law was not intended by the Roman legislators to reach or direct beyond the bounds of the Roman empire, \* \* \* yet, since there is a strong stream of natural reason continually flowing in the channel of the Roman laws, and that there is no affair or business known to any part of the world now which the Roman empire dealt not in before, and their justice still provided for,



what should hinder but that the nature of affairs, being the same, the same general rules of justice and dictates of reason may be as fitly accommodated to foreigners dealing with one another, (as it is clear that they have been by the civilians of all ages,) as to those of one and the same nation, when one common reason is a guide and a light to them both; for it is not the persons, but the case, and the reason therein, that is considerable altogether." (*Phillimore, on Int. Law*, vol. 1, § 38; *Wiseman, Excellency of the Civil Law*, p. 110; *Burke, the Works of*, vol. 2, *Letters on a Regicide Peace*; *The Maria*, 1 Rob. Rep., p. 363; *Bynkershoek, De Foro Legatorum*, ch. 6; *Wildman, Int. Law*, vol. 1, p. 31; *Heffter, Droit International*, §§ 6, 9.)

§ 22. According to the present law and practice of nations, the seat of judicial authority of *prize courts* is located in the belligerent country, and they are dependent, in a measure, upon the laws and institutions of the particular states by which they are established. In this respect they are *ex parte* tribunals. But the subjects of their adjudication, are, without distinction, matters relating to the citizens and property of their own states, of neutrals, and of the belligerent country; and the law itself, by which their decisions should be governed, has no locality, and it is the duty of such a court to determine questions which come before it exactly as it would determine them by sitting in the neutral or belligerent country, the rights of whose citizens are to be adjudicated upon. In theory, therefore, such courts are regarded as international tribunals. But the practice has not at all times corresponded with this theory, and, on this account, it is necessary to rigidly investigate the principles upon which these adjudications are founded, and the reasonings by which they are supported. With this caution in their use, the books of admiralty reports may become an instructive source of information respecting the practical rules of international law. It is also necessary to continually bear in mind the distinction between cases decided upon local law and institutions, and those decided upon general principles, which should govern the intercourse of independent states. Moreover, in great maritime states, which depend for their glory and safety upon their navy, a court will feel, though perhaps unconsciously,

the influence of a national bias in favor of the captor. This remark, we think, is particularly applicable to the very able and learned decisions of the British admiralty. (*Kent, Com. on Am. Law*, vol. 1, p. 68; *Wheaton, Elem. Int. Law*, pt. 1, ch. 1, § 12; *Duer, On Insurancce*, vol. 1, p. 644, note; *Phillimore, On Int. Law*, vol. 1, § 59; *The Maria*, 1 Rob. Rep., p. 350; *The Recovery*, 6 Dod. Rep., p. 349; *Polson, Law of Nations*, sec. 3; *Wildman, Int. Law*, vol. 1, p. 36.)

§ 23. Greater weight is justly attributable to the judgments of *mixed tribunals*, appointed by the joint consent of the several states between which they are to decide, than to those of admiralty courts established by, and dependent, in some measure, on the instructions of a single state; provided that the judges and umpires of these mixed tribunals possess the same character, ability and learning, as the judges of admiralty. But, unfortunately, this has not generally been the case; and the decisions of these boards of arbitration have too often been mere compromises of differences, rather than the elucidation of principles of international law, founded upon the true basis of international justice and supported by right reason. Nevertheless, these adjudications furnish a fruitful source of international law, and may always be consulted with profit and instruction. (*Wheaton, Elem. Int. Law*, pt. 1, ch. 1, § 12; *Phillimore, On Int. Law*, vol. 1, § 59; *Polson Law of Nations*, sec. 3; *Report of Decisions of Com. between U. S. and Great Britain*, 1856.)

§ 24. *The ordinances and commercial laws* of particular states, and the rules prescribed for the conduct of their commissioned cruisers and prize tribunals, may also be referred to for illustrations of the voluntary law of nations, as understood and practised by such states. They, however, should be investigated with caution, and are received only as particular admissions of general principles. Nevertheless, some of the most important modifications and improvements in the modern law of nations have thus originated in the ordinances and commercial regulations, the proclamations and manifestos of particular states. "These public documents furnish, at all events," says Phillimore, "decisive evidence against any state which afterward departs from the principles which it has thus deliberately invoked; and, in every case, thus

clearly recognize the fact that a system of law exists, which ought to regulate and control the international relations of every state." (*Polson, Law of Nations*, sec. 3; *Phillimore, On Int Law*, vol. 1, § 57; *Wheaton, Elem. Int. Law*, pt. 1, ch. 1, § 12; *The Santa Cruz*, 1 Rob. Rep. p. 61.)

§ 25. The same remarks are applicable to the *decisions of local courts*. The adjudication of questions arising from international relations by such tribunals, are not obligatory upon other states, except so far as they conform to general principles and established usages; but as many questions can be decided only in this way, we may derive from this source many rules relative to the positive or practical law of nations. Such decisions, however, from their very nature, are of very limited authority, as expositions of the rules of international law; but the reasons given by the judges, and the precedents referred to in their opinions, furnish a vast fund of information on the particular points discussed. And where such opinions result from a liberal and enlarged inquiry, the decisions are well calculated to strengthen and embellish the conclusions of reason. (*Duer, On Insurance*, vol. 1, p. 479; *Wheaton, Elem. Int. Law*, pt. 1, ch. 1, § 12; *Kent, Com. on Am. Law*, vol. 1, pp. 68–71; *Griswold v. Waddington*, 15 Johns. Rep., p. 57; 16 Johns. Rep., p. 438.)

§ 26. Another source, and perhaps the most fruitful of all, is formed of the *works of text-writers* of approved authority, showing the usage of nations, or the general opinion respecting their mutual conduct, with the definitions and modifications introduced by general consent. As a general rule, authors of text-books and treatises on international law, have risen above the local interests and prejudices which too often influence the writings of diplomatists, and even the decisions of courts, and have treated the subject in a philosophical spirit worthy of all commendation, and which causes their opinions to be referred to as authority on all disputed questions. Of course we cannot expect to find a complete uniformity of opinions in these writers, but there is a very general concurrence of views on all the great and leading principles which they have discussed. "In case where the principal jurists agree," says Kent, "the presumption will be very great in favor of the validity of their maxims; and no

civilized nation, that does not arrogantly set all ordinary law and justice at defiance, will venture to disregard the uniform sense of the established writers of international law." Sir James Mackintosh, in his speech on the annexation of Genoa to the kingdom of Sardinia, says: "It is not my disposition to overrate the authority of this class of writers, or to consider authority in any case as a substitute for reason. But these eminent writers were, at least, necessarily impartial. Their weight, as bearing testimony to general sentiment and civilized usage, receives a new accession from every statesman who appeals to their writings, and from every year in which no contrary practice is established, or hostile principles avowed. \* \* \* I have never heard their principles questioned, but by those whose flagitious policy they had by anticipation condemned." (*Phillimore, On Int. Law*, vol. 1, § 60; *Kent. Com. on Am. Law*, vol. 1, p. 19; *Mackintosh, Miscel. Works*, p. 704; *Suarez, De Legibus*, lib. 6; *The Maria*, 1 Rob. Rep., p. 360; *Wheaton, Elm. Int. Law*, pt. 1, ch. 1, § 12; *Polson, Law of Nations*, § 3; *Wildman, Int. Law*, vol. 1, pp. 34, 35; *Manning, Law of Nations*, p. 56; *Bello, Derecho Internacional*, No. Prel., 87.)

§ 27. But it is not entirely upon their unanimity of opinion on great principles that the authority of text-writers has so great weight in the settlement of controversies between states. As a general rule, reference is made to those who wrote before the cause of the controversy arose, and who are therefore impartial. Moreover, it may be that the text writers belonging to the very country which is urging a demand, have, in advance, pronounced against it. "If the authority of Zouch," says Phillimore, "of Lee, of Mansfield, and, above all, of Stowell, be against the demand of England; if Valin, Domat, Pothier, and Vattel be opposed to the pretensions of France; if Grotius and Bynkershoek confute the claim of Holland; Puffendorf that of Sweden; if Heineccius, Leibnitz, and Wolff array themselves against Germany; if Story, Wheaton, and Kent condemn the act of America, it cannot be supposed (except, indeed, in the particular epoch of a revolution, when all regard to law is trampled under foot,) that the *argumentum ad patriam* would not prevail; at all events, it cannot be doubted that it *ought* to prevail, and

should the country relying upon such authority be compelled to resort to arms, that the guilt of the war would rest upon the antagonist refusing to be bound by it." (*Phillimore, on Int. Law*, vol. 1, § 60; *Kent, Com. on Am. Law*, vol. 1, p. 19; *The Maria*, 3 Rob. Rep., p. 369; *Triquet et al. v. Bath*, 3 Burrows Rep., pp. 14-80; *Polson, Law of Nations*, § 3; *Wildman, Int. Law*, vol. 1, pp. 34, 35.)

§ 28. Express *compacts* between states, and *treaties* of peace, alliance and commerce, declaring, modifying, or defining the rules which regulate their mutual intercourse, furnish another fruitful source of international law. Such treaties and conventions are of binding force only upon the contracting parties, and they cannot modify the original and pre-existing law of nations to the disadvantage of those states which are not direct parties to these compacts; but where they relax the rigor of the primitive law in favor of others, or furnish a more definitive rule of practice in matters which have given rise to conflicting pretensions, the conventional laws thus introduced are not only obligatory upon the contracting parties, but constitute a rule to be observed by them toward the rest of the world. And although one or two treaties, varying from the general usage and custom of nations, cannot alter the pre-existing international law, yet an almost perpetual succession of treaties, establishing a perpetual rule, will go very far toward proving what that law is upon a disputed point. (*Wheaton, Elem. Int. Law*, part. 1, ch. 1, § 12; *Phillimore, On Int. Law*, vol. 1, § 52; *Polson, Law of Nations*, sec. 3; *Wildman, Int. Law*, vol. 1, ch. 1; *Manning, Law of Nations*, p. 74, et seq.; *Bello, Derecho Internacional*, No. Prel., § 7; *Heffter, Droit International*, § 8; *Massé, Droit Commercial*, liv. 1, tit. 2, ch. 2; *Ortolan, Diplomatie de la Mer*, liv. 1, ch. 5.)

§ 29. Thus the consent of several nations, evidenced by treaties, to adopt a particular interpretation of a particular term, is, in the absence of other testimony, strong evidence that such is the true international meaning belonging to it. It is true that no treaty between two or more states can affect the general principles of international law, or directly prejudice the interests of others, though it may do so indirectly by positively declaring the interpretation to be given to a doubtful term, and thus laying down a principle binding, on

them at least, in their intercourse with the rest of the world. This doctrine is laid down with great precision by Lord Grenville in his speech in the house of peers, on the convention with Russia in 1801. We adopt Mr. Phillimore's synopsis of the part relating to *contraband of war*. "He argued that, by the language of that convention, a new sense, and one hitherto repudiated by Great Britain, with respect to *contraband of war*, would be introduced, so far at least as Great Britain was concerned, into *general* international law; inasmuch as some provisions of the treaty, with respect to what should be considered *contraband of war*, were merely *prospective*, and confined to the *contracting parties*, England and Russia, while other provisions of the same treaty were so couched in the preamble, the body, and certain sections which contained them, as to set forth, not the concession of a *special* privilege to be enjoyed by the contracting parties only, but a *recognition* of one universal pre-existing right, they must be taken as laying down a *general rule* for all future discussion with *any power whatever*, and as establishing a principle of law which was to decide *universally* on the just interpretation of the technical term *contraband of war*." (*Wheaton, Elem. Int. Law*, pt. 4, ch. 3, § 29; *Phillimore, On Int. Law*, vol. 1, § 42; *Bynkershoek, Quaest. Jur. Pub.*, lib. 1, cap. 10; *Hansard, Parliamentary Debates*, — 1801; *Wheaton, Hist. Law of Nations*, pp. 390–420; *Manning, Law of Nations*, p. 14.)

§ 30. State papers, and *diplomatic correspondence* between statesmen distinguished for their character and learning, frequently contain much valuable information respecting the particular points and questions of international law which are discussed by them. And perhaps these discussions exhibit the views and opinions of particular states more correctly than the compacts or treaties which may result from them, as such conventions are always more or less the result of compromise or temporary necessity. Moreover, these documents sometimes contain important admissions of what is, or ought to be, the law on points not immediately involved in the conflicting pretensions which have given rise to such discussions. The diplomatic correspondence growing out of particular negotiations may, therefore, very often be referred to with profit,

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Questions connected with the rules of  
enforced by the consent and usage of  
*Int. Law*, vol. 1, § 57; *Wheaton*,  
p. 749; *Wheaton, Elem. Int. Law*, pt. 1,

## CHAPTER III.

### SOVEREIGNTY OF STATES.

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§ 1. A *state* is a body politic, or society of men united together for mutual advantage and safety. Such a society has affairs and interests peculiar to itself, and is capable of deliberation and resolution; it is therefore regarded as a kind of moral person, possessing a will and an understanding, and susceptible of rights and obligations. From the nature and design of such a society, it is necessary that there should be established in it a *public authority*, to order and direct what is to be done by each individual in relation to the end and object of the association. This political authority, whether vested in a single individual or in a number of individuals,



is properly the *sovereignty* of the state. This term, however, in international law, is usually employed to express the external rather than the internal character of a nation, with respect to its ability or capacity to govern itself, independently of foreign powers. A *sovereign state* may, therefore, be defined to be *any nation or people organized into a body politic and exercising the rights of self-government.* (*Grotius, De Jur. Bel. ac Pac.*, lib. 1, cap. 1, § 14; *Vattel, Droit des Gens*, liv. 1, ch. 1, § 4; *Wheaton, Elem. Int. Law*, pt. 1, ch. 2, § 12; *Burlamaqui, Droit de la Nat. et des Gens*, tome 4, pt. 1, ch. 4; *Martens, Precis du Droit des Gens*, §§ 16–19; *Garden, De Diplomatie*, liv. 1, § 3; *Bello, Derecho Internacional*, pt. 1, cap. 1, § 1; *Heffter, Droit International*, §§ 16–25; *Merlin, Repertoire verb. Souveraineté.*)

§ 2. A *state* is distinguishable from a *nation* or a *people*, since the former may be composed of different races of men, all subject to the same supreme authority. Thus, the Austrian, Russian, British and Ottoman empires, are composed of a variety of nations and people. So, also, the same nation or people may be subject to, or compose, several distinct and separate states. Thus the Poles are subject to the dominion of Austria, Prussia, and Russia, respectively; and the Italians constitute several distinct and independent sovereignties. The terms *nation* and *people*, however, are frequently used by writers on international law as synonymous with the term *states*. (*Phillimore, On Int. Law*, vol. 1, § 65; *Wheaton, Elm. Int. Law*, pt. 1, ch. 2, § 2; *Vattel, Droit des Gens*, liv. 1, ch. 1, § 4; ch. 4, § 40; *Garden, De Diplomatie*, tome 1, pt. 1; *Rayneral, Int. du Droit Nat.*, liv. 1, ch. 4.)

§ 3. The sovereignty of a state has reference to its political character, rather than to the nature of its territorial possessions. The territory of some states is in one compact body, like Prussia, Bavaria, and Belgium, in Europe, Mexico, and the United States, in America, while the territory of other states, like that of Great Britain, consists of detached parts situate in every quarter of the habitable globe. Under the general appellation of *state* are included all the possessions of a nation, wheresoever situated, so that a *colony*, however distant, is, in the eye of international law, as much a part of the state which establishes it as is a city or province belong-

ing to its most ancient territory. (*Wheaton, Elem. Int. Law*, pt. 1, ch. 2, § 2; *Phillimore, On Int. Law*, vol. 1, § 63; *Vattel, Droit des Gens*, liv. 1, ch. 18, § 210; *Wildman, Int. Law*, vol. 1, p. 40; *Grotius, de Jur. Bel. ac Pac.*, lib. 1, cap. 3, § 7; *Heineccius, Elementa Juris, Nat. et Gent.*, lib. 1, § 231; *Puffendorf, Jus. Nat. et Gent.*, lib. 8, cap. 12, § 5; *Garden, De Diplomatie*, liv. 1, § 3; *Rayneval, Inst. du Droit Nat.*, liv. 1, ch. 4; *Bowyer, Universal Public Law*, ch. 21; *Heffter, Droit International*, §§ 16–25, 29–31; *Bello, Derecho Internacional*, pt. 1, cap. 1, § 3.)

§ 4 As a colony, a possession, or a dependency, constitutes only a part of the state, it cannot in itself be regarded, in international law, as a distinct political organization. Hence, any public or private corporation, created by, and deriving its authority from a state, cannot of itself constitute a separate and independent sovereignty. Thus, the East India Company, although exercising the sovereign powers of peace and war, with respect to the native princes and people, acted in subordination to the supreme power of the British empire, and was represented by the British government in all its relations with foreign sovereigns and states. (*Grotius, de Jur. Bel. ac Pac.*, liv. 1, cap. 3, § 7; *Vattel, Droit des Gens*, liv. 1, ch. § 210; *Wheaton, Elem. Int. Law*, p. 1, ch. 2, § 2; *Phillimore, On Int. Law*, vol. 1, § 63; *Wildman, Int. Law*, vol. 1, p. 40; *Heineccius, Elementa Juris et Gent.*, lib. 1, § 231; *Puffendorf, Jur. de la Nat. et Gent.*, liv. 8, cap. 12, § 5; *Heffter, Droit International*, §§ 16–25.)

§ 5. The mere fact of dependence, however, does not prevent a state from being regarded in international law as a separate and distinct sovereignty, capable of enjoying the rights and incurring the obligations incident to that condition. Much more importance is attached to the nature and character of its connection with other states, and the degree and extent of its dependence. Thus, many European states, which are still regarded as sovereign, do not exercise the right of self-government entirely independent of other states, but have their sovereignty limited and qualified in various degrees, either by the character of their internal constitution, or by the stipulations of unequal treaties of alliance and protection. (*Heffter, Droit International*, §§ 16–25; *Wheaton*,

*Elem. Int. Law*, pt. 1, ch. 2, § 12; *Vattel, Droit des Gens*, liv. 1, ch. 1, §§ 5, 6; *Phillimore, On Int. Law*, vol. 1, § 77; *Grotius, de Jur. Bel. ac Pac.*, lib. 1, ch. 3, §§ 2, 3, 21; *Martens, Precis du Droit des Gens*, § 20; *Riquelme, Derecho Pub. Int.*, tome 1, p. 104.)

§ 6. Nor is the sovereignty of a particular state necessarily destroyed by its mere nominal obedience to the commands of others, nor even by an habitual influence exercised by others over its councils. Thus, the city of Cracow, in Poland, with its territory, was declared by the congress of Vienna, in 1815, to be a perpetually free, independent, and neutral state, under the protection of Russia, Austria and Prussia. Although its councils were habitually influenced by these great powers, it was nevertheless regarded in international law as a sovereign state; and when, by the convention of 1846, it was annexed to the empire of Austria, the governments of Great Britain, France and Sweden, protested against the proceeding as a violation of the act of 1815, by which it was recognized as an independent state (*Wheaton, Elem. Int. Law*, pt. 1, ch. 2, § 13; *Martens, Nouveau Recueil*, tome 2, p. 386; *Kluber, Acten des Wiener Cong.*, b. 5, § 138; *Ortolan, Diplomatie de la Mer*, liv. 1, ch. 2; *De Cussy, Precis Historique*, p. 7; *Martens, Precis du Droit des Gens*, §§ 19, et seq.)

§ 7. So, also, tributary states, and those subject to a kind of feudal dependence or vassalage, are still considered as sovereign, unless their sovereignty is destroyed by their relation to other states. Tribute, like that paid by the European maritime powers to the Barbary States, does not necessarily affect the sovereignty of the tributary; nor does the acknowledgment of a nominal vassalage or feudal dependence, like that of Naples to the Papal See, prior to 1818, necessarily impair the sovereignty of the vassal state. Its position in the eye of international law is not necessarily affected by its connections of this kind with others. The law regards the fact of sovereignty rather than the mere name by which it is designated. (*Ward, Hist. Law of Nations*, vol. 2, p. 69; *Wheaton, Elem. Int. Law*, pt. 1, ch. 2, § 14; *Bynkershoek, Quaest. Jur. Pub.*, lib. 1, cap. 17; *Martens, Precis du Droit des Gens*, § 21; *Heffter, Droit International*, §§ 30-31; *Riquelme, Derecho Pub. Int.*, tomo 1, p. 104; *Ortolan, Diplomatie de la Mer*, liv. 1, ch. 2.)

§ 8. But the character of a state *may* be legally affected by its connection with others, and its sovereignty will be considered as impaired or entirely destroyed, according to the nature of the compact, the extent of the influence exercised by the superior, and the obedience acknowledged or rendered by the inferior; no matter whether such condition results from political organization or from treaties of unequal alliance and protection. If a state, in either of these modes, parts with its rights of negotiation and treaty, and loses its essential attributes of independence, it can no longer be regarded as a sovereign state, or as a member of the great family of nations. Its legal *status* is not changed by a loss of relative power, but by a loss of the essential attributes of independence and sovereignty—the right to exercise its volition, and the capacity to contract obligations. (*Wheaton Elem. Int. Law*, pt. 1, ch. 2, § 13; *Ortolan, Diplomatie de la Mer*, liv. 1; *Fletcher v. Peck*, 6 *Cranch Rep.*, p. 146; *The Cherokee Nation v. The State of Georgia*, 5 *Peters Rep.*, p. 1; *The U. S. v. Rogers*, 4 *Howard Rep.*, p. 572; *Martens, Precis du Droit des Gens*, § 820; *Riquelme, Derecho, Pub., Int.*, tomo 1, p. 105.)

§ 9. The effect of a *protectorate* upon the sovereignty of a state must depend entirely upon the character and conditions of the protection afforded. No doubt, one state may place itself under the protection of another without losing its international existence as a sovereign state, if it retains its capacity to treat, to contract alliances, to make peace and war, and to exercise the essential rights of sovereignty. But these rights must be retained *de facto*, as well as *de jure*, for although a state may retain the forms of independence, if it be practically and notoriously governed by officers appointed by another state, and incapable of exercising its own volition, it will be regarded as a mere dependence of the governing power. (*Ortolan, Diplomatie de la Mer*, liv. 1, ch. 2; *Wheaton, Elem. Int. Law*, pt. 1, ch. 2, § 13; *Martens, Nouveau Recueil*, tome 2, p. 663; *Martens, Precis du Droit des Gens*, § 20; *Wheaton, Hist. Law of Nations*, pp. 5, 56–60; *Grotius, De Jur. Bel. ac. Pac.*, lib. 1, cap. 3, § 21; *Wildman, Int. Law*, vol. 1, p. 67; *Vattel, Droit des Gens.*, liv. 1, ch. 16, § 192; *Riquelme, Derecho Pub. Int.*, tomo 1, p. 105.)

§ 10. Two or more sovereign states may be united together under a common ruler, or by a federal compact; and it will depend upon the nature of this union or confederation, whether such states retain their separate sovereignty, notwithstanding this connection with others. If each separate state retains the essential qualities of independence,—the right of will and judgment, and the full capacity to contract obligations,—it will still be regarded as a distinct society or body politic, possessing the rights of sovereignty, and subject to its duties; but if it has lost these qualities by such union with others, either by becoming subject to their will, or by creating a new national power, of which it is only a component part, it can no longer be regarded, in the eye of international law, as a sovereign state, although it may retain many of its sovereign rights with respect to its confederates. (*Martens, Précis du Droit des Gens*, §§ 20–29; *Wheaton, Elem. Int. Law*, pt. 1, ch. 2, §§ 15, 16; *Grotius, de Jur. Bel. ac Pac.*, liv. 2, cap. 9, §§ 8, 9; *Klüber, Droit des Gens*, pt. 1, cap. 1, § 27; *Heffter, Droit International*, §§ 19, 29; *Riquelme, Derecho Pub. Int.*, tome 1, p. 107; *Ortolan, Diplomatie de la Mer*, liv. 1, ch. 2; *Wildman, Int. Law*, vol. 1, p. 67; *Merlin, Répertoire, verb Souveraineté*.)

§ 11. A union of two or more states under a common sovereign is called a *personal union*, if there is no incorporation, and if the component parts are united with a perfect equality of rights. Thus, Hanover, and the United Kingdom of Great Britain and Ireland, were at one time subject to the same prince, but there was no dependence on each other and both retained their respective national rights of sovereignty. Sometimes the individuality of the state is merged by such personal union, (*unio personalis*), and, with respect to its external relations, remains for a time in abeyance, but emerges again on the dissolution of the union and resumes its rank and position as an independent sovereign state. (*Grotius, de Jur. Bel. ac Pac.*, lib. 1, cap. 3, § 7; *Wheaton, Elem. Int. Law*, pt. 1 ch. 2, § 16; *Phillimore, On Int. Law*, vol. 1, § 76; *Klüber, Droit des Gens*, pt. 1, ch. 1, § 27; *Martens, Précis du Droit des Gens*, § 29; *Bowyer, Universal Public Law*, ch. 27; *Heffter, Droit International*, § 20; *Ortolan, Diplomatie de la Mer*, liv. 1, ch. 2.)

§ 12. A *real union* of different states, under a common sovereign, is where the several component parts are not only united under the same sceptre, but the sovereignty of each is merged in the general sovereignty of the empire, as to their international relations with foreign powers, although still retaining respectively their distinct fundamental laws and other political institutions. Thus the Austrian monarchy, prior to 1849, was a *real union*, composed of the hereditary dominions, the kingdoms of Hungary, Bohemia, and other states, each of which retained a separate sovereignty with respect to its coördinate states, but were component parts of the empire, with respect to their international relations with other powers. By the constitution of 1849 and the patent of 1851, a more central system was adopted, and provision was made for uniform municipal legislation. (*Wheaton, Elem. Int. Law*, pt. 1, ch. 2, § 17; *Annual Register*, 1849, p. 317; *Annuaire des Deux Mondes*, 1852–3, pp. 541–545; *Grotius, De Jur. Bel. ac Pac.*, lib. 1, ch. 3, § 7.)

§ 13. An *incorporate union* is where several states are united under a common sovereign, and a common government and legislature, although each may have its distinct laws and a separate but subordinate administration. Thus the three kingdoms of England, Scotland and Ireland are incorporated into an empire, the sovereignty of each original kingdom being completely merged by their successive unions in the United Kingdom, which, in international relations, is regarded as a single state. There is no essential difference, in international law, between a *real* and an *incorporate union* of states; the sovereignty of the component parts being in both cases considered as completely merged in the new imperial sovereignty which results from such union. (*Merlin, Répertoire, verb. Souveraineté*; *Wheaton, Elem. Int. Law*, pt. 1, ch. 2, § 18; *Phillimore, On Int. Law*, vol. 1, § 74; *Grotius, de Jur. Bel. ac Pac.*, lib. 1, cap. 3, § 21; *Klüber, Droit des Gens*, pt. 3, ch. 1, § 21; *Heffter, Droit International*, § 20; *Martens, Précis du Droit des Gens*, § 29.)

§ 14. Sovereign states are sometimes firmly united together by a federal compact, without acknowledging any common sovereign. This kind of union is perhaps less frequent among monarchies than among states which have a republican form

of government. From the extremely complicated nature of these leagues or federal compacts, it is sometimes very difficult to determine how far the sovereignty of each nation is affected or impaired by the conditions or regulations of such union. These compacts are divided by publicists into two general classes, *confederated states* and *composite states*. (*Wheaton, Elem. Int. Law*, pt. 1, ch. 2, §§ 18-22; *Phillimore, on Int. Law*, vol. 1, § 103; *Grotius, De Jur. Bel. ac Pac.*, lib. 1, cap. 3, § 7; *Martens, Precis du Droit des Gens*, § 29; *Bowyer, Universal Public Law*, ch. 27; *Ortolan, Diplomatie de la Mer*, liv. 1. ch. 2; *Wildman, Int. Law*, vol. 1, p. 67; *Merlin, Répertoire verb. Souveraineté*.)

§ 15. By a *confederation*, or *system of confederated states*, we understand that kind of union, or compact, which does not essentially differ from an ordinary treaty of equal alliance. The resolutions of the federal body are enforced not as laws directly binding upon the individual subjects of each state, but upon each separate government which adopts them, and gives them the force of law within its own jurisdiction; thus leaving to each state the exercise of its own will and responsibility in its general intercourse with foreign powers.

The Swiss confederation of 1815, established under the mediation of the allied powers, and guaranteed by the congress of Vienna, has been regarded by some text writers as a mere league or system of confederated states, not differing essentially from a treaty of perpetual alliance between independent communities, in which each member of the union retains its own sovereignty unimpaired. But as the Diet formed by the twenty-two cantons of Switzerland had power to regulate the tariff of frontier duties, to provide for the common protection, to support a common army, with the exclusive power of declaring war and concluding treaties of peace, alliance, and commerce with foreign states, it seems to us that, by this confederation, the essential qualities of state sovereignty were merged in the Diet, and that the sovereign power of each separate canton was greatly impaired, if not completely destroyed, so far as international relations with foreign powers were concerned.

The Germanic confederation, formed between the free cities of Germany, the Emperor of Austria, the King of Prussia,

and other German states, and having for its declared object the preservation of the internal and external security of Germany, and the independence and inviolability of the confederated states, left to each member the power of contracting alliances and making treaties with other foreign states, except with an enemy against whom the confederation had declared war, and provided that such treaties or compacts were not directed against the security of the confederation or the individual states of which it was composed. It may be doubted if subsequent changes in this Germanic constitution have not materially impaired the sovereignty of the smaller states.

The confederation of 1778, between the United States of North America, was nothing more than a *system of confederated states*. The difficulty of enforcing the laws and regulating foreign affairs of the government led to the adoption of a constitutional Union. (*Wheaton, Elem. Int. Law*, pt. 1, ch. 2, §§ 21–25; *Wheaton, Hist. Law of Nations*, p. 447, et seq.; *Phillimore, On Int. Law*, vol. 1, §§ 104–117; *Story, On the Constitution*, b. 2, ch. 3; *Kent, Com. on Am. Law*, vol. 1, pp. 212, et seq.; *Bowyer, Universal Public Law*, ch. 27; *Hamilton, The Federalist*, No. 15; *Heffler, Droit International*, § 21; *Ortolan, Diplomatie de la Mer*, liv. 1, ch. 2.)

§ 16. A *composite state*, or *supreme federal government*, results from a grant of supreme federal powers to the government of the union, with the consequent limitations imposed upon the separate governments of the several compact states. Each separate state may retain its own legislature, and its distinct laws and administration, and its separate sovereignty may still subsist internally in respect to its coördinate states, and, in respect to the supreme federal government, in questions of power not expressly granted to it; but in all external relations its sovereignty is completely merged and destroyed.

The union of the United States of America, by the federal constitution of 1787, is regarded, in international law, as a composite state, or supreme federal government. So, also, of the Republic of Mexico, both as a confederation of states, and as a more central organization under the departmental system. (*Phillimore, On Int. Law*, vol. 1, §§ 118, et seq.; *Wheaton, Elem. Int. Law*, p. 1, ch. 2, §§ 22, 34; *Story, On the*



*Constitution*, b. 3, ch. 3; *Martens, Précis du Droit des Gens*, § 29; *Heffter, Droit International*, §§ 21, 22.)

§ 17 *Semi-sovereign states* are those which do not possess all the essential rights of sovereignty, and which, therefore, can be regarded as subjects of international law only indirectly, or at least in a subordinate degree. Such states must generally, in war, share the fortunes of their protector, and in peace, must have his consent to the engagements they may desire to form with others. But as they are, for certain purposes, and under certain limitations, to be dealt with independently of such protectors, it is necessary to regard them as distinct organizations. Such states are usually independent in their action, on mere questions of comity, such as the rights of strangers in their own territory, and of their own subjects in foreign countries. (*Phillimore, On Int. Law*, vol. 1, § 78; *Wheaton, Elem. Int. Law*, pt. 1, ch. 2, § 13; *Klüber, Droit des Gens*, pt. 3, ch. 1, § 24; *Martens, Précis du Droit des Gens*, § 20; *Heffter, Droit International*, § 31, 22; *Ortolan, Diplomatie de la Mer*, liv. 1, ch. 2; *Moser, Beitrage, etc.*, b. 1, p. 508.)

§ 18. The sovereignty of a state is acquired either at the origin of the civil society of which it consists, or when it separates itself from the community of which it formed a part, and assumes the rights and obligations of a distinct and independent political organization. All questions with respect to the origin of states, belong to the province of political philosophy, rather than to that of international law. As has already been remarked, the sovereignty of a state, as considered in international law, is not determined by the character of its origin, the extent of its power or domain, or by the nature of its internal government, but by its relations to others and its capacity to deliberate and act for itself. (*Wheaton, Elem. Int. Law*, pt. 1, ch. 2, § 6; *Phillimore, On Int. Law*, vol. 1, § 264; *Klüber, Droit des Gens*, pt. 3, ch. 1, § 23; *Heffter, Droit International*, §§ 23, 24.)

§ 19. A state, as to the individual members of which it is composed, is a fluctuating body, being kept up by a constant succession of new members; so, also, its form of government and municipal constitution may be subjected to frequent alterations and changes; but these fluctuations and changes

in the constituent parts of the body politic, and in their relations to each other, do not affect the character of the body itself, in its external relations to other communities,—that is, in international law. The state itself remains the same political body, until its identity is destroyed by interruption in its existence as a separate and distinct society; and it neither loses any of its rights nor is discharged from any of its obligations, by any mere municipal change or internal revolution. (*Phillimore, On Int. Law*, vol 1, § 126; *Wheaton, Elem. Int. Law*, pt. 1. ch. 2, § 7; *Grotius, de Jur. Bel. ac Pac.*, lib. 2, cap. 9, § 3; *Rutherford, Institutes*, b. 2, ch. 10, §§ 12, 13, 14; *Heffler, Droit International*, § 24; *Bello, Derecho Internacional*, pt. 1, cap. 1, § 8; *Merhn, Repertoire, verb, Souveraineté*.)

§ 20. Vattel has laid down the rule, that when a country is divided by a civil war, each faction is to be deemed an independent state, and that a foreign power may assist those whose cause it deems to be just. This doctrine of Vattel is probably founded upon a misconstruction of a passage of Grotius; it is not reconcilable with reason or precedents, but is opposed to what Vattel himself has said with respect to the interference of one state in the internal affairs of another. If a foreign state may take part in the civil wars of its neighbors, there would be no limit to its right to interfere in their domestic affairs. His principle, that the parties to a civil war are independent of all foreign authority, and that no foreign power has any right to judge of their acts toward each other, is correct. Both parties may be entitled to the rights of war toward each other, and consequently to the rights of belligerents with respect to foreign states as neutrals in the contest, such as the rights of blockades, of sieges, etc. But beyond those rights which are necessarily incidental to a state of war, a foreign power cannot, during the war, regard the two factions as independent states, and give assistance to the one whose cause it may deem to be just! Such conduct would be a direct violation of the rights of sovereignty and independence. But even supposing that the two parties, from the very commencement of a civil war or a revolution, are to be treated in every respect as independent states, it by no means follows that a foreign power may render assistance to

the one whose cause it may deem to be just. This would be constituting such foreign power a judge of the *justice* of the war; whereas, if both parties are to be considered as independent states, the war is to be deemed, in international law, as *just* on both sides! Moreover, would the justice or injustice of the war be in itself a sufficient reason for the interference of a foreign power? Certainly not.

The above mentioned rule of Vattel has been copied by Wheaton without comment, and apparently without questioning its correctness. But, notwithstanding this implied endorsement of so high an authority, we have no hesitation in pronouncing the doctrine as not only erroneous, but exceedingly dangerous, from the fact that it justifies the most objectionable species of intervention in the internal affairs of states. But the language of Wheaton is more limited and cautious than that of Vattel; and when he says that other states "may espouse the cause of the party which they believe to have justice on its side," and that by so doing a state becomes "the enemy of the party against whom it declares itself, and the ally of the other," he probably means merely to express the legal results of such a declaration, and not to say that the justice or injustice of the cause would in itself justify such declaration, or authorize such interference. In this view, his language is reconcilable with other parts of his work. (*Vattel*, *Droit des Gens*, liv. 2, ch. 6, § 56; *Grotius*, *de Jur. Bel. ac Pac.*, lib. 2, cap. 18, § 2; *Wildman*, *Int. Law*, vol. 1, pp. 51, 57; *Bynkershoek*, *Quaest. Jur. Pub.*, lib. 2, cap. 3; *Wheaton*, *Elem. Int. Law*, pt. 1, ch. 2, § 7; *Puffendorf*, *de Jur. Nat. et Gent.*, lib. 8, cap. 9, § 3; *Kent*, *Com. on Am. Law*, vol. 1, pp. 24-25.)

§ 21. Whilst the civil war continues, or while a revolted colony or province is shaking off the bonds of its former government, a foreign state should either remain a passive spectator, or, if its own relations require diplomatic intercourse with the revolted society, it should treat such revolted society as a *de facto* government only, in its foreign relations, and not as an independent state, with respect to its relations with its own sovereign, or its own metropolitan government. But when the contest is virtually determined, and the revolted province or colony has virtually established its inde-

pendence, foreign powers, without any just offense to the metropolitan country, may recognize that independence and enter into full diplomatic and commercial relations with the new state as a separate and distinct sovereignty. It is not necessary in such cases to await the acknowledgement of that independence by the former sovereign; of the fact of such independence, each state may judge for itself. "The absence of all jurisdiction," says Wildman, "to determine the right, leads to the necessary consequence, that, when in the result of a civil war, a state changes its government, or a province, or colony, that before had no separate existence, is in the possession of the rights of sovereignty; the possession of sovereignty *de facto* is taken to be possession *de jure*: and any foreign power is at liberty to recognise such sovereignty by treating with the possessor of it as an independent state. Where sovereignty is necessary to the validity of an act, no distinction is or ought to be made between sovereignties founded on a good or bad title. Few governments have been founded on free suffrage and election; most have originated in violence and faction. In international transactions possession is sufficient. Otherwise it would be necessary to inquire into the origin of sovereignties, and to ascertain whether they are founded upon a good or upon a bad title. Such an inquiry could answer no good purpose, and would furnish ample occasion to disturb the peace of nations." (Wildman, *International Law*, vol. 1, p. 57; Wheaton, *Elm. Int. Law*, pt. 1, ch. 2, §§ 7–10; Puffendorf, *Jus. Naturae et Gent.*, lib. 8, ch. 12, § 3; Bynkershoek, *Quaest. Jur. Pub.*, lib. 2, ch. 3; Kent, *Com. on Am. Law*, vol. 1, p. 25; Wicquefort, *l'Ambassadeur, etc.*, lib. 1, pp. 40, 57, 58; Martens, *Precis du Droit des Gens*, §§ 79–82; Alison, *Hist. Europe*, second series, chs. 4, 12.)

§ 22. The recognition of the independence and sovereignty of a revolted province by other foreign states, when that independence is established in fact, is therefore a question of policy and prudence only, which each state must determine for itself; but this determination must be made by the sovereign legislative or executive power of the state, and not by any subordinate authority, or by the private judgment of individual subjects. And until the independence

of the new state is recognised by the government of the country of which it was before a part, or by the foreign state where its sovereignty is drawn in question, courts of justice, and private individuals, are bound to consider the ancient state of things as remaining unaltered. (*Wheaton, Elm. Int. Law*, pt. 1, ch. 2, § 10; *Martens, Nouvelles causes, etc.*, tome 1, pp. 370-494; *Garden, De Diplomatie*, liv. 2, § 6; *Webster, The Works of*, vol. 6, pp. 488-506; *Kennett v. Chambers*, 14 *Howard's Rep.*, p. 38; *Hoyt v. Gelston*, 3 *Wheaton's Rep.*, p. 324, note; *The Manilla*, 1 *Ed., Ad. Rep.*, pt. 1; *Bello, Derecho Internacional*, pt. 1, cap. 1, § 7; *The Santissima Trinidad*, 7 *Wheaton's Rep.*, p. 305; *The Pelican*, 1 *Edw. Rep.*, Appen. D.)

§ 23. The sovereignty of a state may be lost in various ways. It may be vanquished by a foreign power and become incorporated into the conquering state as a province, or as one of its component parts; or it may voluntarily unite itself with another in such a way that its independent existence as a state will entirely cease. Again, two sovereign states may become incorporated into one, so as to form a new sovereign state in place of the other two whose independent existence, as states, is entirely destroyed by such incorporation.

Thus, the incorporation of the Seven United Provinces and the Austrian Low Countries, by the treaties of Vienna, under the Prince of Orange, as King of the Netherlands, was the union of two distinct sovereignties, forming a new single sovereign state. By the incorporation of Wales, Scotland, and Ireland, into Great Britain, and of Normandy and Brittany into France, these incorporated states lost their existence as distinct and substantive political bodies. (*Phillimore, On Int. Law*, vol. 1, § 125; *Wheaton, Elm. Int. Law*, pt. 1, ch. 2, §§ 8, 9; *Grotius, de Jur. Bel. ac Pac.*, lib. 2, cap. 9, § 6; *Puffendorf, de Jure Nat. et Gent.*, lib. 8, cap. 12, § 9; *Bello, Derecho Internacional*, pt. 1, cap. 1, § 8; *Heffier, Droit International*, §§ 24, 25.)

§ 24. Questions of great importance sometimes arise with respect to the international effects produced by internal changes in the form of government, and by a change in the sovereignty of a state, with respect to its duties and obligations toward others. These questions relate to treaties, public debts, the public domain, private rights of property,

and to responsibility for wrongs done to the governments or subjects of other states. We will consider these matters, 1st, with respect to the effects of a change in the internal form of the government; 2d, with respect to the effects of a dismemberment of a state by the revolt or loss of a province; 3d, the effects of a division of one into two or more separate and independent states; and, 4th, the effects of an incorporation of two or more separate states into one, forming a new and distinct sovereignty. (*Wheaton, Elem. Int. Law*, pt. 1, ch. 2, § 11; *Phillimore, On Int. Law*, vol. 1, §§ 126 et seq; *Wildman, Int. Law*, vol. 1, p. 68; *Grotius, De Jur. Bel. ac Pac.*, lib. 3, cap. 9, §§ 8, 9, 10; *Heffter, Droit International*, § 25; *Merlin, Repertoire, verb. Souveraineté*.)

§ 25. As a general rule, a mere change in the form of government, or in the person of the ruler, does not affect the duties and obligations of a state toward foreign nations. All treaties of amity, commerce, and real alliance, remain in force precisely as if no intervening change had taken place, except in cases where the compact relates to the form of government itself, or to the person of the ruler in the nature of a guaranty. Public debts, whether due to or from the revolutionized state, are neither canceled nor affected by any change in the constitution or internal government of a state. So, also, of its public domain and right of property. If a revolution be successful, and a new constitution be established, the public domain and public property pass to the new government. The state, on the other hand, remains responsible for the wrongs done to the government or subjects of another state, notwithstanding any intermediate change in the form of its government or in the persons of its rulers. These results flow necessarily from the principle that the identity of a state is preserved, notwithstanding the accidental changes in its internal constitution. (*Wheaton, Elem. Int. Law*, pt. 1, ch. 2, § 11; *Vattel, Droit des Gens*, liv. 2, ch. 12, §§ 188-197; *Phillimore, On Int. Law*, vol. 1, § 126; *Mably, Du Droit Public*, tome 1, pp. 111-112; *D'Aguessseau, Œuvres de M. le C.*, tome 1, p. 493, § 4; *Montesquieu, l'Esprit des Loix*, liv. 26, ch. 20; *Grotius, De Jur. Bel. ac Pac.*, lib 2, cap. 9, § 8; *Tindall, Essay on the Laws of Nations*, p. 12; *Kent, Com. on Am. Law*, vol. 1, pp. 25-26; *Bynkershoek*,

*Quæst. Jur. Pub.*, lib. 2, cap. 10 ; *Puffendorf, De Jur. Nat. et Gent.*, lib. 8, cap. 12. § 2 ; *Heineccius, Elementa Juris Nat. et Gent.*, lib. 2, § 231 ; *Bello, Derecho Internacional*, pt. 1, cap. 1, §§ 6-8 ; *Heffter, Droit International*, § 25.)

§ 26. The dismemberment of a state, by the loss of a portion of its subjects and territory, does not affect its identity, whether such loss be caused by foreign conquest, or by the revolt and separation of a province. Such a change no more effects its rights and duties, than a change in its internal organization, or in the person of its rulers. This doctrine applies to debts due to, as well as from, the state, and to its rights of property and its treaty obligations, except so far as such obligations may have particular reference to the revolted or dismembered territory or province. (*Wheaton, Elem. Int. Law*, pt. 1, ch. 2, § 11 ; *Grotius, de Jur. Bel. ac Pac.* lib. 2, cap. 9, § 8 ; *Puffendorf, de Jur. Nat. et Gent.*, lib. 8, cap. 12, §§ 1, 2, 3 ; *Heffter, Droit International* §§ 24, 25 ; *Phillimore, On Int. Law*, vol. 1, § 187 ; *Heineccius, Elementa Juris.*, lib. 2, § 231 ; *Wheaton, Hist. Law of Nations*, p. 546 ; *Terrett et al. v. Taylor*, 9 Cranch's Rep., p. 50 ; *Calvin's Case*, 7 Coke Rep., p. 27 ; *Wildman, Int. Law*, vol. 1, p. 68.)

§ 27. The case is slightly different where one state is divided into two or more distinct and independent sovereignties. In that case, the obligations which had accrued to the whole, before the division, are, (unless they have been the subject of a special agreement,) rateably binding upon the different parts. This principle is established by the concurrent opinions of text-writers, the decisions of courts, and the practice of nations. It was incorporated into the treaty by which the modern kingdom of Belgium was established. Kent says: "If a state should be divided with respect to territory, its rights and obligations are not impaired ; and if they have not been apportioned by special agreement, those rights are to be enjoyed, and those obligations fulfilled, by all the parts in common." Story says: "It has been asserted, as a principle of common law, that the division of an empire creates no forfeiture of previously vested rights of property ; and this principle is equally consonant with the common sense of mankind, and the maxims of eternal justice." (*Wildman, Int. Law*, vol. 1, p. 68 ; *Kent, Com. on Amer. Law*, vol. 1, p.

26; *Wheaton, Elem. Int. Law*, pt. 1, ch. 2, § 9; *Phillimore, On Int. Law*, vol. 1, § 137; *Heffler, Droit International*, § 25; *Zacharia, Staats un Bundesrecht*, § 58; *Grotius, de Jur. Bel. ac Pac.*, liv. 2, ch. 9, § 10; *Terrett et al v. Taylor et al*, 9 Cranch's Rep., p. 50; *Kelly v. Harrison*, 2 Johnson's Cases, p. 29; *Jackson v. Dunn*, 3 Johnson's Cases, p. 109; *Calvin's Case*, 7 Coko Rep., p. 27; *Merlin, Repertoire, verb. Souveraineté*.)

§ 28. The converse of this rule is also generally true; that is, where several separate states are incorporated into a new sovereignty, the rights and obligations which had accrued to each one separately, before the incorporation, belong to, and are binding upon the new state which is created by such incorporation. But the rule must be varied or modified to suit the nature of the union formed, and the character of the act itself of incorporation in each particular case. Thus, a distinction must be made between the mere union, or confederation of states, and the creation of a new sovereignty, or composite state. In the one case, the obligations would remain with the states originally separate, while in the other case, they would, as a general rule, be transferred from the constituent parts to the new body politic. But if, by the act of incorporation, and by the constitution of the composite state, the rights and obligations of the component parts were to remain with the states originally separate, it could hardly be contended that the new sovereignty had either acquired the one or incurred the other. What might be claimed or incurred, under a general rule of presumptive law, could hardly be enforced against written instruments which provide especially against such claims or obligations. Nevertheless, if one of these constituent parts, originally a separate state, should, by the act of incorporation, vest in the new sovereignty all its means of satisfying its debts and obligations, the new state would, even in the case of a mere federal union, be bound to assume such debts and obligations to the extent of the means so transferred. (*Phillimore, On Int. Law*, vol. 1, § 137; *Wheaton, Elem. Int. Law*, pt. 1, ch. 2, § 9; pt. 4, ch. 1, § 12; *Wheaton, Hist. Law, of Nations*, pp. 492–546; *Florida Bonds, Com. of Claims between U. S. and G. B.*, pp. 246, et seq.; *Holford's Case, Com. of Claims between U. S. and G. B.* pp. 882, et seq.; *Wildman, Int. Law*, vol. 1, p. 68; *Grotius*,



*International Law.*

no. 2, cap. 9, § 9; *Heineccius, Elementa*  
*Masson, Hist. de la Diplo.*, tome 3, p.  
(voir verb. *Souveraineté*.)

## CHAPTER IV.

### RIGHTS OF INDEPENDENCE AND SELF-PRESERVATION.

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#### CONTENTS.

§ 1. Independence of a sovereign state — § 2. Foreign interference in its internal government — § 3. Its right to choose its own rulers — § 4. Such interference in dependent and confederated states — § 5. Interference in virtue of treaty stipulations — § 6. Proffered mediation, and mediation by invitation — § 7. Distinction between pacific mediation and armed intervention — § 8. When an arbitrator may employ force — § 9. Interference to preserve a balance of power — § 10. Treaty of Paris and Congress of Vienna in 1814 and 1815 — § 11. Attempted tripartite treaty respecting Cuba — § 12. Interference for self-security — § 13. This a pretext rather than an excuse — § 14. Independence of a state in its legislation — § 15. In its judiciary — § 16. In rewarding and punishing its own subjects — § 17. The case of Martin Koszta — § 18. Right of self-preservation — § 19. Means incidental to general right — § 20. Use of these means may be limited by treaty — § 21. By the rights of others — § 22. Extraordinary increase of army and navy — § 23. Fortifications and military schools — § 24. Right of self-defence without the limits of a state — § 25. Mr. Phillimore's basis of this pretended right — § 26. Defect of his argument — § 27. Such acts are belligerent, even when justifiable.

§ 1. Every sovereign state may, from the very nature of its organization, freely exercise its sovereign rights in any manner not inconsistent with the equal rights of other states. The very fact of its sovereignty implies its independence of the control of any other state. It may therefore exercise all rights and contract all obligations incident to its sovereignty,

as a separate, distinct, and independent society, or political organization. These rights and obligations are limited only by the law of nature and the existence of similar rights in others. The international rights of sovereign states have therefore been divided into two classes: *absolute* and *conditional*, the former, including those rights to which a state is entitled as a distinct being or sovereignty, and the latter including those rights to which it is entitled only under particular circumstances in its relation to others. (*Wheaton, Elm. Int. Law*, pt. 2, ch. 1, § 1; *Klüber, Droit des Gens*, § 36; *Vattel, Droit des Gens*, prelim., § 15; *Rayneval, Inst. du Droit Nat.*, liv. 2, ch. 1; *Bello, Derecho Internacional*, pt. 1, cap. 1, § 7; *Heffter, Droit International*, §§ 29–31; *Riquelme, Derecho Internacional*, lib. 1, tit. 1, sec. 1, cap. 5; *Ortolan, Diplomatie de la Mer*, liv. 1, ch. 3.)

§ 2. The right of every sovereign state to establish, alter, or abolish, its own municipal constitution and form of government, would seem to follow, as a necessary conclusion, from these premises. And from the same course of reasoning, it will be, inferred, that no foreign state can interfere with the exercise of this right, no matter what political or civil institutions such sovereign state may see fit to adopt for the government of its own subjects and citizens. It may freely change from a monarchy to a republic, from a republic to a limited monarchy, or to a despotism, or to a government of any imaginable shape, so long as such change is not of a character to immediately, or of necessity, affect the independence, freedom and security of others. (*Wildman, Int. Law*, vol. 1, pp. 47, 68; *Wheaton, Elm. Int. Law*, pt. 2, ch. 1, § 12; *Phillimore, On Int. Law*, vol. 1, § 148; *Martens, Precis du Droit des Gens*, § 78; *Ortolan, Diplomatie de la Mer*, liv. 1, ch. 2; *Grotius, De Jur. Bel. ac Pac.*, lib. 2, ch. 9, § 8; *Bynkershoek, Quaest. Jur. Pub.*, lib. 2, ch. 21, § 1; *Heffter, Droit International*, § 26.)

§ 3. The right of a sovereign state to the choice of its own rulers rests upon the same foundation as its right to determine the form of its own internal constitution; and the interference of a foreign state in the one case cannot be justified except under the same circumstances and upon the same grounds as in the other, viz., *the immediate and pressing danger*

to its own independence and security. In other words, the change must involve *external* as well as *internal* relations, in order to render foreign interference in such case justifiable, even under the most liberal and extended rules of construction. Moreover, even in the case supposed, if the danger is only remote and problematical, it would fail to make the interference justifiable in the eye of international law. (*Kent, Com. on Am. Law*, vol. 1, p. 21; *Phillimore, on Int. Law*, vol. 1, §§ 389, 390; *Vattel, Droit des Gens*, prelim., § 22; liv. 1, ch. 5, §§ 66, 67; *Wheaton, Elem. Int. Law*, pt. 2, ch. 1, § 15; *Martens, Precis du Droit des Gens*, § 76.)

§ 4. No writer of authority, on international law, advocates any general right of one sovereign and independent state to interfere with the domestic concerns and internal government of another sovereign and independent state. Some, however, make numerous exceptions to the general rule, and attempt to justify interference by one state, in the internal affairs of another, in particular cases and for certain specified objects. The principal grounds upon which such interference has been justified are: first, self defence; second, the obligations of treaty stipulations; third, humanity; and fourth, the invitation of the contending parties in a civil war. We will here examine each of these grounds, with respect to pacific interference, reserving for another place a discussion of how far they will justify a resort to force or a war of intervention. (*Vide Post*, ch. 14; *Phillimore, on Int. Law*, vol. 1, § 400; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 14; *Heffler, Droit International*, §§ 44–46; *Wenck, Codex Juris Gent.*, t. 1, p. 3; *Manning, Law of Nations*, p. 98.)

§ 5. Foreign interference in the *internal* affairs of a state, has sometimes been defended on the ground of a necessity on the part of the interfering states, involving their own particular security. That a right of pacific interference, and even of armed intervention, may sometimes grow out of such threatened danger to a particular state, cannot be doubted. So, also, there may be an impending danger, affecting the general security of nations, which may justify an interference on their part, for the security of their own independence and the preservation of peace. But such danger must be threatening and immediate, and not a mere remote contingency; and

even then the interference must be limited to the removal of the danger itself; beyond that it would be unlawful. (*Kent, Com. on Am. Law*, vol. 1, p. 25; *Wheaton, Elm. Int. Law*, pt. 2, ch. 1, § 8; *Vattel, Droit des Gens.*, prelim., § 22; *Phillimore, On Int. Law*, vol. 1, § 390; *Heffler, Droit International*, §§ 44, 46; *Manning, Law of Nations*, pp. 97, 98.)

§ 6. But this impending or contingent danger to the general peace of nations, or to the independence of particular states, is more frequently appealed to as an *excuse*, than as a *justifiable reason*, for foreign interference in the internal affairs of others. And instead of preserving peace, such unlawful interference has frequently been the cause of wars the most cruel and bloody that have ever stained the annals of history. We scarcely need refer to the wars which resulted from foreign interference in the internal affairs of France in the revolution of 1789, in proof of our assertion. Unfortunately historians and juriconsults are too apt to draw their arguments from the *fact* to the *right*, and to infer the right of interference from the numerous examples of its actual exercise, without testing the legality of the usage by reference to fundamental principles. If foreign interference in the internal affairs of a sovereign state, (except in cases of imminent and actual danger to the general or particular security, freedom, and independence of nations,) is contrary to natural law, as the fundamental principle of international jurisprudence, usage, and custom, cannot make it justifiable or lawful, for no length of usage can justify a wrong. (*Kent, Com. on Am. Law*, vol. 1, pp. 23-25; *Wheaton, Elm. Int. Law*, pt. 2, ch. 1, §§ 3, 4; *Wheaton, Hist. Law of Nations*, pp. 80, 88; *Wildman, Int. Law*, vol. 1, pp. 49, 50; *Vattel, Droit des Gens*, liv. 2, ch. 1, § 7; *Bynkershoek, Foro Legatorum*, cap. 2, § 4; *Bynkershoek, Quaest. Jur. Pub.*, lib. 1, cap. 25; *Edinburg Review*, No. 156, p. 329; *Le Louis*, 2 *Dod. Rep.*, p. 257.)

§ 7. That the general rule of natural law is opposed to all interference in the internal affairs of another state, cannot be doubted. It is confirmed by reason, and the concurring opinions of the most eminent publicists of all ages and all nations. It must nevertheless be admitted that there are exceptions to this rule. The principle difficulty is in confining the exceptions so as not to infringe upon the princi-

ple of the rule. The general rule, and the possible exception to it, were both very clearly stated by M. de Chateaubriand in his speech in the French Chamber, on the Spanish war of 1823. "Has," said he, "a government of one country a right to interfere in the affairs of another? This great question of international law has been resolved in different ways, by different writers on the subject. Those who incline to the natural right, such as Bacon, Puffendorff, Grotius, and all the ancients, mention that it is lawful to take up arms in the name of the human race against a society which violates the principles on which the social order reposes, on the same ground on which, in particular states, you punish an individual malefactor who disturbs the public repose. Those who consider the question as one depending on civil right, are of opinion that no one government has a right to interfere in the affairs of another. I adopt, in the abstract, the principles of the last. I maintain that no government has a right to interfere in the affairs of another government. In truth, if this principle is not admitted, and above all by all people who enjoy a free constitution, no nation could be in security. It would always be possible for the corruption of a minister, or the ambition of a king to attack a state which attempted to ameliorate its condition. In many cases wars would be multiplied; you would adopt a principle of eternal hostility—a principle of which every one would constitute himself judge, since every one might say to his neighbor, your institutions displease me; change them, or I declare war.

"But when the modern political writers rejected the right of intervention, by taking it out of the category of natural to place it in that of civil rights, they felt themselves very much embarrassed at the result; for they saw that cases will occur in which it is impossible to abstain from intervention without putting the state in danger. At the commencement of the revolution, it was said, 'Perish the colonies rather than one principle,' and the colonies perished. Shall we also say, 'Perish the social order rather than sacrifice a principle;' and let the social order perish? In order to avoid being shattered against a principle which they themselves had established, the modern jurists have introduced an excep-

tion. They said, no government has a right to interfere in the affairs of another government, *except in the case where the security and immediate interests of the first government are compromised.*" (*De Cussy, Precis Historique*, ch. 4; *Phillimore, On Int. Law*, vol. 1, §§ 390 et seq.; *Alison, Hist. of Europe*, ch. 12, §§ 41, et seq.; *Moniteur*, Feb. 15th, 1823; *Heffter, Droit International*, §§ 44-46; *Manning, Law of Nations*, p. 98.)

§ 8. Another ground of foreign interference in the internal affairs of a sovereign state, advocated by some text-writers, is the obligations of treaty stipulations. There can be no doubt that a sovereign state may guarantee a particular form of government to one of its component parts, as the constitution of the United States of America guarantees a *Republican* form to each state of the federal union; or, in case of a protectorate, the protecting state may guarantee or direct a particular form of government for the dependent or protected state. But neither the component nor the protected states are in these cases to be regarded as independent sovereignties; they have parted with some of the essential qualities of sovereignty and independence, and, consequently, are not entitled to the full rights incident to their primary condition as equal members of the society of nations. The same doctrine may apply generally to treaties of unequal alliance. But, in treaties of equal alliance, between independent and sovereign states, will a stipulation of mediation or guaranty justify generally the interference of one state in the internal affairs of another, contrary to the wishes of the latter? If the interference is in itself unlawful, can any previously existing stipulation make it lawful? We think not; for the reason that a contract against public morals has no binding force, and there is more merit in its breach than in its fulfilment. (*Wheaton, Elem. Int. Law*, pt. 2, ch. 1, §§ 13-16; *Klüber, Droit des Gens*, pt. 2, tit. 1, ch. 2, § 48; *Phillimore, On Int. Law*, vol. 1, § 393; *Polson, Law of Nations*, sec. 5; *Bello Derecho Internacional*, pt. 1, cap. 1, § 7.)

§ 9. Another ground of foreign interference, in the internal affairs of a sovereign state, is that of *humanity*, it being done for the alleged purpose of stopping the effusion of blood caused by a protracted and desolating civil war in the bosom

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of the state so interfered with. If such interference be in the nature of a pacific mediation, one state merely proposing its good offices for the settlement of the intestine dissensions of another state, there can be no doubt of its lawfulness. How far interference by *force*, or an armed intervention in the internal affairs of another state, may be justified on the ground of humanity, will be considered in another chapter. (*Vide Post*, ch. xiv., § 21; *Phillimore, On Int. Law*, vol. 1, § 394, et seq.; *Grotius, De Jur. Bel. ac Pac.*, lib. 2, cap. 20, § 40; *Heffter, Droit International*, §§ 44–46.)

§ 10. Again, suppose such interference in the internal affairs of another state be made on the invitation of the contending parties in the civil war? If the invitation be from only one of the contestants, it can, by itself, confer no rights whatever as against the other party. But if both parties unite in the invitation, it will afford just grounds for the interference of the mediating power. How far such invitations will justify an armed intervention between the contending parties, will be discussed in another chapter. It is sufficient to remark in this place, that the opinion or decision of a mediating power, whether the mediation be proffered or invited, is of the nature of advice, or rather of a proposition for an amicable adjustment of existing differences; which proposition may be rejected by one or both of the parties, without just offense to the mediator. (*Kent, Com. on. Am. Law*, vol. 1, p. 25; *Phillimore, On Int. Law*, vol. 1 § 395; *Heffter, Droit International*, §§ 44–46; *Martens, Precis do Droit des Gens*, §§ 176, 327, 330.)

§ 11. But if such proffered or invited mediation is of the nature of an arbitration, in which the question of difference is submitted to the decision of the mediating power as an *arbitrator*, with an agreement to abide by such decision, neither party can properly refuse to abide by the result of the reference, unless it be shown that the award has been made in collusion with one of the parties, or that it exceeds the terms of the submission. The general rules governing such arbitrations, are the same as those governing arbitrations between sovereign and independent states, which will be discussed in another chapter. (*Vide Post*, ch. xii, § 7; *Phillimore, On Int. Law*, vol 1, § 395; *Wheaton, Elem. Int. Law*,



pt. 2, ch. 1, § 13; *Garden, De la Diplomatie*, tome 1, p. 486; *Heffter, Droit International*, §§ 44-46; *Rayneval, Droit de la Nat. et des Gens*, liv. 3, ch. 22.)

§ 12. But suppose the award has been made without collusion, and has been confined to the terms of the submission, and that one of the parties should refuse to abide by the decision, although both agreed to do so, will such refusal justify the mediating power in employing force to compel obedience to its decision? To decide this question, it will be necessary to inquire into the particular circumstance of each case. The arbitrator's right to use force, in order to carry his decision into effect, if it exist at all, must be deduced from the terms of the agreement entered into by the contracting parties to the submission. It does not result, as a necessary consequence of his undertaking the office of arbitrator. But this question will be more particularly discussed under the head of *wars of intervention*; we are here considering only the general right of pacific interference, or pacific mediation, in the internal affairs of a state. (*Vide Post*, chapter xiv, § 12; *Phillimore, On Int. Law*, vol. 1, § 395; *Heffter, Droit International*, § 45; *Rayneval, Droit de la Nat. et des Gens*, liv. 3, ch. 22.)

§ 13. There are certain cases where the very character of the constitution or government of one state may authorize the interference of another in the choice of its rulers. Such cases, however, are mainly confined to semi-sovereign, or dependent states. But the states of the church have usually been regarded, in the international law of Europe, as sovereign and independent. Nevertheless, Austria, France, and Spain, as catholic countries, have a voice in the election of the Pope, who is the temporal sovereign of the Roman states, as well as the supreme Pontiff of the Roman Catholic church. But if these spiritual and temporal officers should be separated, the right of foreign states to interfere in the choice of the person to fill the office of civil ruler, might well be questioned. In the case of a composite state, or a confederation of several states, the right of one state to interfere in the affairs of another, or of the supreme government to interfere with that of one of its constituents, will depend upon the constitution or plan of confederation; it does not result from

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any general right in sovereign states, as recognized by international law. (*Wheaton, Elem. Int. Law*, pt. 2, ch. 1, §§ 13–16; *Mayer, Corpus Juris Germ.*, lib. 2, p. 196; *Klüber, Droit des Gens*, pt. 2, tit. 1, ch. 2; *Martens, Precis du Droit des Gens*, § 76; *Garden, De Diplomatie*, tome 1, pt. 3, § 6; *Heffter, Droit International*, §§ 40, 41; *Acte, Final du Congress de Vienna*, art. 74; *Constitution of the United States*, art. 3.)

§ 14. Another incident to the sovereignty of a state is its independence of every other in its legislative power, so far as such independence does not conflict with the sovereign rights of other states, and is not limited or modified by acts of union or the stipulations of treaty. There is, however, properly speaking, no conflict in laws relating to *public* international jurisprudence, so long as each sovereign state confines its legislation within its own proper and legitimate limits, that is, to the regulation of the rights and duties of its own subjects *inter se*, and in their relations to their own government. But in what is called *private* international law, which regulates the rights of individuals of one state with respect to the laws and institutions of other states, there is not unfrequently a *conflict of laws*. A consideration of this subject belongs to another chapter. (*Wheaton, Elem. Int. Law*, pt. 2, ch. 2, § 1; *Foelix, Droit International Privé*, § 3; *Vide Post*, ch. 7, §§ 1 et seq.; *Polson, Law of Nations*, sec. 5; *Garden, De Diplomatie*, tome 1, pt. 3, § 7; *Rayneval, Droit de la Nat., etc.*, liv. 1, ch. 11; *Riquelme, Derecho Pub. Int.*, lib. 2, tit. 1, cap. 1.)

§ 15. So, also, every sovereign state is independent of every other in the exercise of its judicial power, which, subject to the exceptions already mentioned, is coëxtensive with its legislative power. At the same time, this power does not embrace cases where the municipal institutions of another nation operate within its territory, as in cases of a public minister, a foreign fleet or army, rights of extritoriality conceded by treaty, etc. But these questions will be more particularly discussed elsewhere. (*Wheaton, Elem. Int. Law*, pt. 2, ch. 2, § 12; *Bynkershoek, De Foro Legat.*, cap. 3; *Casaregis, Discursus, Leg.*, pp. 136, 174; *The Exchange v. McFaden*, 7 Cranch., Rep., p. 185; *Garden, De Diplomatie*, tome 1, pt. 3, § 7; *Bello, Derecho Internacional*, pt. 1, cap. 4, § 4; *Rayneval, Droit de la Nat., etc.*, liv. 1, ch. 11.)

§ 16. Every sovereign state being independent of all others in the exercise of its legislative and judicial powers, it follows, as a necessary consequence, that it is also independent of all others in the rewards and punishments of its own subjects. It may make its own laws defining offenses, organise its own tribunals for trying them, and for awarding punishments to its own subjects, and it may inflict its punishments upon its own subjects found in its own vessels upon the high seas, or within its own territorial jurisdiction. Moreover, its laws and penalties follow its citizens into all places and all countries; but it can neither arrest nor punish them within the territorial jurisdiction of a foreign state, except where such a right is conceded by treaty stipulations. (*Bynkershoek, De Foro Legatorum*, cap. 2, § 8; *Wheaton, Elem. Int. Law*, pt. 2, cap. 2, § 2, *Huberus, Prælect*, tome 2, liv. 1, tit. 3; *Wildman, Int. Law*, vol. 1, p. 60; *Rose v. Himely*, 4 Cranch. Rep., p. 278; *Garden, De Diplomatie*, tome 1, pt. 3, § 7.)

§ 17. The case of Martin Koszta, in 1858, and the discussions resulting from his seizure and forcible release, have given to the foregoing rule of international law a prominent position in the public mind. Koszta, a Hungarian banished from Austrian dominions for political offenses, had acquired a domicil and taken the preliminary steps to naturalization in the United States. While thus clothed with the national character of the United States, his business called him to the Turkish port of Smyrna, where he was seized by Austrian agents, and confined in an Austrian vessel of war, the *Husza*, preparatory to transportation to the Austrian port of Trieste. The Turkish authorities not only disavowed this act of Austrian officials, but protested against their conduct as in violation of Turkish sovereignty. Under these circumstances, the captain of the United States vessel of war, the *St. Louis*, demanded and enforced Koszta's release from the Austrian vessel. Austria not only demanded a disavowal by the United States of the acts of the American agents, and satisfaction for what she deemed an offense to her own flag, but also sent a circular to other European courts, complaining of the rescue of Koszta as a violation of international law. All these allegations were most clearly and satisfactorily disproved in the masterly despatch of Mr. Marcy, the American Secretary of

State, to the Austrian Chargé d'Affaires, in which it was shown that Austria had been the real aggressor, and that the United States had made no intentional encroachment upon the sovereign territorial rights of Turkey. Had that power been able to protect the integrity of her soil from Austrian encroachment, in the seizure of a person clothed with American nationality, there would have been no occasion for the interposition of American authority for the protection of that person. But in her own inability to protect the rights of Americans against Austrian aggression, she assented to and approved the acts of the American agents in doing so themselves; and certainly if she was satisfied, others had no right to complain in a matter which in no way affected them. Baron de Cussy, in reviewing this transaction, has not duly considered this point, nor indeed has he correctly and fully stated the true facts and circumstances of the case. In answer to the charge of a violation of international law by the United States, with respect to Turkey, Mr. Marcy said: "Before closing this communication, the undersigned will briefly notice the complaint of Austria against Captain Ingraham, for violating the neutral soil of the Ottoman Empire. The right of Austria to call the United States to an account for the acts of their agents, affecting the sovereign territorial rights of Turkey, is not perceived, and they do not acknowledge her right to require any explanation. If anything was done at Smyrna in derogation of the sovereignty of Turkey, this government will give satisfactory explanation to the Sultan when he shall demand it, and it has instructed its minister resident to make this known to him. He is the judge, and the only rightful judge, in this affair, and the injured party too. He has investigated its merits, pronounced judgment against Austria, and acquitted the United States; yet, strange as it is, Austria has called the United States to an account for violating the sovereign territorial rights of the Emperor of Turkey." (*Marcy to Hulsemann*, Sept. 26th, 1853; *Cong. Doc.*, 33d Cong., 1st sess. Sen., Ex. Doc. No. 1; *Wheaton*, *Elem. Int. Law*, pt. 2, ch. 2, § 5, note (a); *De Cussy*, *Droit Maritime*, liv. 2, ch. 12, § 12.)

§ 18. Another right immediately resulting from the independence of sovereign states, is that of *self-preservation*. This

is one of the most essential and important rights incident to state sovereignty, and lies at the foundation of all the rest. It is not only a *right* with respect to other states, but a *duty* with respect to its own members, and one of the most solemn and important duties which it owes to them. "The right of "self-preservation," says Phillimore, "is the first law of "nations, as it is of individuals. A society which is not in "a condition to repel aggression from without, is wanting in "its principal duty to the members of which it is composed, "and to the chief end of its institution." (*Phillimore, On Int. Law*, vol. 1, § 210; *Vattel, Droit des Gens*, lib. 1, ch. 24, § 177; *Wheaton, Elem. Int. Law*, pt. 2, ch. 1, § 2; *Polson, Law of Nations*, sec. 5; *Martens, Precis du Droit des Gens*, § 116; *Garden, De Diplomatie*, tome 1, pt. 8, § 5; *Ortolan, Diplomatie de la Mer*, liv. 1, ch. 8.)

§ 19. This right of self-preservation necessarily involves all other incidental rights which are essential as means to give effect to the principal end. And other nations have no right to prescribe what these means shall be, or to require any account or explanation of the conduct of a sovereign state in this respect, except so far as their own peace and safety may be affected or threatened. The means usually resorted to for this purpose are the construction of fortifications, the organization of military and naval forces, and the contraction of alliances with other states. "The full liberty of a nation in this respect," says Phillimore, "cannot, as a general principle of international law, be too boldly announced or too firmly maintained." (*Phillimore, On Int. Law*, vol. 1, § 211; *Wheaton, Elem. Int. Law*, pt. 2, ch. 2, § 2; *Polson, Law of Nations*, sec. 5; *Martens, Precis du Droit des Gens*, § 117.)

§ 20. But the exercise of these incidental rights may be modified or controlled by special compacts freely entered into with other states. Thus, by the treaties of 1748, and 1763, France engaged to demolish the fortifications of Dunkirk, and this stipulation, so humiliating to the French nation, was not effaced till the treaty of 1783. Again, by the treaty of 1815, France engaged to demolish the fortifications of Huningen, and never to renew them nor to replace

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them by other fortifications within three leagues of the city of Basle. By the treaty of 1856, between Russia, Turkey, and the allies, the former stipulated to relinquish her right to construct military-marine arsenals, and to maintain a naval force in the Black sea. All such compacts, when freely entered into, are binding, notwithstanding that they limit the natural rights of independent states. (*Wheaton, Elem. Int. Law*, pt. 2, ch. 2, § 2; *Martens, Recueil des Traittés*, tome 2, p. 469; *Polson, Law of Nations*, sec. 5; *Phillimore, On Int. Law*, vol. 8, Appendix, pp. 828, et seq.; *Ortolan, Diplomatie de la Mer*, tome 2, App., special; *Heffter, Droit International*, Appendice; *De Cussy, Precis des Evenements*, ch. 12.)

§ 21. These incidental rights may also be modified, or limited, by the equal and corresponding rights of other states. If, under the plea of self-defense, a nation makes extraordinary warlike preparations, inconsistent with pretended pacific intentions, and threatening to the peace and independence of others, such threatened states may very properly demand an explanation, and, if none of a satisfactory character is given, to require a discontinuance of such hostile demonstrations. Such hostile preparations, if not satisfactorily explained, may become a matter of serious complaint, but seldom, if ever, in themselves alone a just cause of war. (*Phillimore, On Int. Law*, vol. 1, § 212; *Martens, Precis du Droit des Gens*, § 118; *Polson, Law of Nations*, sec. 5; *Ortolan, Diplomatie de la Mer*, liv. 1, ch. 3.)

§ 22. A distinction, however, must be made between those means and preparations for self-defense, which are exclusively *defensive*, and those which, from their nature, may also be regarded as offensive. Thus an extraordinary increase of the military and naval forces of a state, may be calculated to alarm other nations whose peace and security they may appear to menace. It is, therefore, usual under such circumstances, to require and to receive amicable explanations of such warlike preparations. And if asked for in a proper tone and spirit, the explanation cannot be properly refused, without giving offense, or, at least, well-founded cause for suspicion. (*Phillimore, On Int. Law*, vol. 1, §§ 212-13; *Martens, Precis du Droit des Gens*, §§ 117, 118; *Pinkiero Ferreira*,

*Com. sur Martens*, tome 1, Note 62; *Moser, Versuch, etc.*, t. 6, pp. 409, 413; *Gunther, Europ. Völkerrecht*, b. 1, pp. 293–319;)

§ 23. Not so, however, with respect to the erection and arming of fortifications, which are essentially means of defense and self-preservation. That such works are of immense assistance in carrying on military and naval operations against others, cannot be doubted, but they cannot of themselves be injurious or dangerous to foreign powers. They, therefore, are not just causes of complaint by others. The same may be said of military schools, and a general diffusion of military education and military science among the subjects of a state. They are legitimate and proper means of self-preservation, which every sovereign state has a perfect right to use, and others have no right to require an account of its conduct in this respect. (*Jomini, Precis de l'Art de la Guerre*, ch. 2, sec. 1, § 1; *Halleck, Elm. Mil. Art and Science*, ch. 3; *Phillimore, On Int. Law*, vol. 1, § 211.)

§ 24. The means of self-preservation which we have hitherto considered as the right of a sovereign state to resort to, are such as are made *within* its own dominions, or on the high seas. It has been contended by some that, for the same reasons, a state may extend its precautionary measures *without* its own territorial limits and within the borders of a neighboring state. Mr. Phillimore describes a hypothetical case which would come under this pretended rule of international jurisprudence. "A rebellion, or a civil commotion, it may happen, agitates a nation; while the authorities are engaged in repressing it, bands of rebels pass the frontier, shelter themselves under the protection of the conterminous state, and from thence, with restored strength and fresh appliances, renew their invasions upon the state from which they have escaped. The invaded state remonstrates. The remonstrance, whether from favor to the rebels, or feebleness of the executive, is unheeded, or, at least, the evil complained of remains unredressed. In this state of things, the invaded state is warranted by international law, in crossing the frontier, and in taking the necessary means for her safety, whether these be the capture or dispersion of the rebels, or the destruction of their stronghold, as the exigencies of the case may fairly require." This is certainly a very extraordi-

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nary pretension; let us examine the reasons by which it has been attempted to sustain this right of extra-territorial jurisdiction. (*Phillimore, On Int. Law*, vol. 1, §213: *Phillimore, Letter to Lord Ashburton*, p. 27, et seq.)

§ 25 Mr. Phillimore has himself pointed out what he conceives to be the principle of international law, from which he derives this pretended right of one state to transgress the borders of its neighbor's territory in time of peace, not as an act of hostility, but as a kind of pacifico-belligerent right of territorial violability; pacific with respect to the *state* whose territory is invaded, and belligerent with respect to the *particular powers and places* attacked or destroyed. "International law," he says, "considers the right of self-preservation as prior and paramount to that of territorial inviolability, and, where they conflict, justifies the maintenance of the former, at the expense of the latter right." The words of the same author, in another place, furnish a complete answer to his argument, viz: "The policy which seeks to establish one principle of international law upon the ruin of others, has been, and always must be, a policy as fatal to the lasting peace of the world as the attempt to promote one moral duty at the expense and by the sacrifice of others, is, and must be, fatal to the peace of an individual." (*Phillimore, On International Law*, vol. 1, §§ 213, 218, 398.)

§ 26. The defect of Mr. Phillimore's argument, consists in the assumption of a false principle for its basis, and his erroneous premises necessarily lead him to an erroneous conclusion. There can be no conflict of rights, *stricti juris*, between states in time of peace. No such principle is admitted in the code of *public* international law. It is a maxim of that law, that every *right* is followed by corresponding *duties* and *obligations*. If, therefore, one state has a right to violate the territory of a neighbor, in time of peace, for what it sees fit to consider the purposes of self-defense, that neighbor is bound to permit its territory to be so violated, as often as the other party may conceive that the necessity exists. But it is an established principle, that every sovereign state has a right to protect the inviolability of its own territory, and that any invasion of it is an act of hostility, which may be repelled by force. So, the other party may also enforce, with



arms, if need be, its own right of territorial transgression, incident to its *paramount* right of self-defense! Here, then, we have force repelling force in the pacific exercise of established public international rights! This is the legitimate and necessary consequence of Mr. Phillimore's argument. Its defects are too manifest to require any extended discussion. *Webster, Off. and Dip. Papers*, pp. 104-120, 140-222; *Phillimore, On Int. Law*, vol. 1, § 213, 218; *Wildman, International Law*, vol. 1, ch. 2.)

§ 27. But it may be asked, shall the state, which is suffering from the piratical incursions organized in, and emanating from a neighboring state, do nothing in self-defense, and for self-preservation? Must she wait till the invading force crosses her own borders, before she can attack or destroy it? Not at all. If the neighboring state, from the want either of the will or of the ability, neglects to prevent such excursions, or to suppress such organizations, the threatened state may cross the frontier and attack or destroy the threatened danger. But the act is one of *hostility*, and she performs it in the exercise of her *belligerent rights*, not in the exercise of a pacific right of self-defense. It is not necessary that such act should be preceded by a declaration of war, nor, indeed, that it should be followed by a public and solemn war in form; nevertheless, it is a belligerent act, justifiable, perhaps, by the circumstances of the case and the culpable neglect of the other party, and, as such, belongs to that class of hostile operations known in international jurisprudence as *imperfect war*, and which will be more particularly discussed in another chapter. (*Wheaton, Elem. Int. Law*, pt. 2, ch. 1, § 13; *Grotius, de Jur. Bel ac Pac.*, lib 1, cap. 8, § 1; *Burlamaqui, Droit de la Nat.*, etc., tome 5, pt. 4, ch. 3; *Vattel, Droit des Gens*, liv. 2, ch. 6, § 72.)

## CHAPTER V.

## RIGHTS OF EQUALITY.

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§ 1. "Nations," says Vattel, "composed of men, and considered as so many free persons living together in the state of nature, are naturally equal, and inherit from nature the same obligations and rights. Power or weakness does not in this respect produce any difference. A dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom." In other words, all sovereign states, without respect to their relative power,

are, in the eye of international law, equal, being endowed with the same natural rights, bound by the same duties, and subject to the same obligations. One of the fundamental principles of public law, generally recognized, says Sir William Scott, is the perfect equality and independence of all distinct states. Relative magnitude creates no distinction of right; relative imbecility, whether permanent or casual, gives no additional right to the more powerful neighbor, and any advantage seized on that ground is mere usurpation. This is the great foundation of public law, which it mainly concerns the peace of mankind, both in their political and private capacities, to preserve inviolate. (*Vattel, Droit des Gens*, prelim, § 18; *Phillimore, On Int. Law*, vol. 1, §§ 168-169; *Gunther, Europ. Volkerrecht*, b. 1, §§ 6, 7, p. 284; *Polson, Law of Nations*, sec. 5; *The Louis*, 2 Dod. Rep., p. 243; *Wildman, Int. Law*, vol. 1, p. 48; *The Antelope*, 10 *Wheaton's Rep.*, p. 120; *Garden, De Diplomatie*, tome 1, pp. 353, et seq.; *Bowyer, Universal Public Law*, ch. 23; *Heffter, Droit International*, § 27; *Bello, Derecho Internacional*, pt. 1, cap. 1, § 2; *Ortolan, Diplomatie de la Mer*, liv. 1, ch. 2.)

§ 2. A necessary consequence of this equality of sovereign states is the general rule of public law, that, "whatever is lawful for one nation is equally lawful for any other; and whatever is unjustifiable in the one is equally so in the other." Vattel, in discussing the sovereignty and independence of states, says that the effect of such a *status* "is to produce, at least externally and among men, a perfect equality of rights between nations, in the administration of their affairs and the pursuit of their pretensions, without regard to the intrinsic justice of their conduct, of which others have no right to form a definitive judgment; so that what is permitted in one is also permitted in the other, and they ought to be considered, in human society, as having equal rights." (*Martens, Precis du Droit des Gens*, § 125; *Vattel, Droit des Gens*, prelim., § 21; *Wheaton, Elem. Int. Law*, pt. 2, ch. 1, § 1; *Klüber, Droit des Gens Mod.*, § 86.)

§ 3. Another necessary consequence of this equality is the rule that all sovereign princes and states may assume whatever titles of dignity they think fit, and may exact from their own subjects the corresponding marks of honor. But their

recognition by other states is not a matter of strict right, especially in the case of new titles of higher dignity assumed by sovereigns. Thus, the royal title of King of Prussia, assumed by Frederick I., in 1701, was not acknowledged by the Pope until 1786, nor by the Teutonic knights until 1792. So, also, the title of Emperor of all the Russias, assumed by Peter the Great, in 1701, was first acknowledged by France in 1745, by Spain in 1759, and by Poland in 1764. A similar delay has been made by more modern states in the recognition of the new titles of higher dignity assumed by sovereigns of other states. (*Bello, Derecho Internacional*, pt. 1, cap. 18, § 1; *Wheaton, Elem. Int. Law*, pt. 2, ch. 3, § 6; *Ward, Hist. Law of Nations*, vol. 2, pp. 245–248; *Klüber, Droit des Gens Mod.*, pt. 1, tit. 1, ch. 2, § 107, note; *Flassan, Hist. de la Dip. Fran.*, liv. 2, pp. 328–364; *Vattel, Droit des Gens*, liv. 2, ch. 3, §§ 41, 43; *Polson, Law of Nations*, sec. 5; *Phillimore, On Int. Law*, vol. 2, § 30; *Rayneval, Inst. du Droit Nat.*, liv. 2, ch. 15; *Heffler, Droit International*, § 53.)

§ 4. Where, however, we wish to promote a friendly intercourse with another nation, or to have another state recognize the titles we have conferred on our public officers, we cannot very well refuse to acknowledge those which it has given to its rulers; so, also, with respect to honors and distinctions claimed as due to such rulers, policy, friendship and fear have not unfrequently induced certain states to yield the precedence to others. This has caused the establishment in Europe, at different periods, of different regulations with respect to foreign ceremonial. This ceremonial is founded, in part, upon custom, and, in part, upon the stipulations of conventions and treaties. There can be no doubt that the natural equality of sovereign states may be modified by the consent which is implied from constant usage, or by positive compacts voluntarily entered into, so as to entitle one state to a superiority over another, in respect to external matters, such as rank, titles, and other ceremonial distinctions. (*Wheaton, Elem. Int. Law*, pt. 2, ch. 3, § 1; *Martens, Précis du Droit des Gens*, §§ 125, 126; *Vattel, Droit des Gens*, liv. 2, ch. 3, § 37; *Ortolan, Diplomatie de la Mer*, liv. 1, ch. 8; *Bello, Derecho Internacional*, pt. 1, cap. 18, § 1.)

§ 5. Thus the catholic powers concede the precedence to the Pope, as the visible head of the church ; but Russia, and the protestant states of Europe, consider him only as a sovereign prince in Italy, and, as such, entitled to royal honors, but not to any precedence from his rank as sovereign pontiff. The Emperor of Germany, under the former constitution of the empire, was entitled to precedence over all other temporal princes, as the supposed successor of Charlemagne, and of the Cæsars, but the claim is considered to have been lost by the dissolution of the Germanic Constitution, and the new organization of the Austrian Empire. (*Wheaton, Elem. Int. Law*, pt. 2, ch. 3, § 3; *Martens, Precis du Droit des Gens*, § 132; *Klüber, Droit des Gens*, pt. 2, tit. 1, ch. 3, § 95; *Vattel, Droit des Gens*, liv. 2, ch. 3, § 40; *Polson, Law of Nations*, sec. 5; *Gunther, Europ. Völkerrecht*, b. 1, p. 222; *Bello, Derecho Internacional*, pt. 1, cap. 18, § 3.)

§ 6. The sovereign, or ruler of a state, is considered, in international law, as representing, in his person, its sovereign dignity. It matters not whether he is a monarch or a president, whether he is the *de facto* or the *de jure* head of a nation, (if he has been duly recognized as such,) custom has invested his person with certain international rights, as the representative of his state. He is therefore entitled to the precedence and honor due to the nation of which he is the ruler. But as sovereigns and rulers seldom meet in council, questions of this kind do not often arise between them individually. There, however, were no less than five such congresses between 1814 and 1821, viz: the congress of Vienna, 1815; of Aix-la-Chapelle, 1818; of Troppau, 1820; of Verona, 1820; and of Laybach, 1821. As all matters of etiquette and precedence in such congresses are usually arranged before the meeting of the sovereigns, questions of precedence are not likely to arise in the congress itself. Difficulties of this kind, in former times, not unfrequently arose between public ministers who were considered as representing the sovereignty of their respective states, and who consequently claimed honors which others were unwilling to concede. This led to serious disputes, which were sometimes attended with fatal consequences. (*Phillimore, On Int. Law*, vol. 2, §§ 89, 101, 102; *Heffter, Droit International*, § 55; *Wildman, Int. Law*, vol. 1,

p. 38; *Vattel, Droit des Gens*, liv. 1, ch. 3, § 40; *Grotius, de Jur. Bel. ac Pac.*, lib. 1, cap. 7, § 3; *Bello, Derecho Internacional*, pt. 1, cap. 18, § 3; *De Cussy, Precis des Evenements*, passim.)

§ 7. We find numerous examples of these disputes in European diplomacy of past ages, some of a serious character, and others exceedingly ludicrous. Thus, at the public entry of the Swedish ambassador into London, a contest for precedence took place between the French and Spanish ambassadors, which was attended with loss of life on both sides, and probably would have led to war, if the king of Spain, who was interested in maintaining peace with France, had not made such concessions as to satisfy the pride of Louis XIV. Again, the ambassadors of two Italian princes met on the bridge at Prague, and as neither would give way, they stood for the greater part of the day, face to face, exposed to the jeers of the crowd collected by the strangeness of the spectacle. Such disputes, sometimes serious and sometimes ludicrous, have led to the adoption, at different times, of certain conventional rules of etiquette and precedence. These rules are binding only upon those who have agreed to them. They, however, serve as a basis for the adjustment of any disputes which arise between others who are not parties to these conventional agreements. (*Bynkershoek, Quaest. Jur. Pub.* lib. 2, ch. 9; *Wicquefort, l'Ambassadeur, etc.*, liv. 1, § 24; *Wildman, Int. Law*, vol. 1, ch. 3; *Ward, Law of Nations*, vol. 2, pp. 458, et seq; *Villefort, Privilèges Diplomatiques*, passim.)

§ 8. The customary law of European nations has attributed to certain states what are called *royal honors*, which entitle the states, by whom they are possessed, to precedence over all others who do not enjoy the same rank, with the exclusive privilege of sending to other states public ministers of the first rank, together with other distinctive titles and ceremonies. Among the princes who enjoy these honors, differences have arisen with respect to relative rank and precedence; but these questions are now mostly settled by usage and treaty stipulations, and where not thus settled, they are regarded as of very little importance, or at least, of not sufficient consequence to lead to very serious national differences

or discussions. (*Wheaton, Elem. Int. Law*, pt. 2, ch. 3, § 2; *Vattel, Droit des Gens*, liv. 2, ch. 3, § 38; *Martens, Precis du Droit des Gens*, § 129; *Klüber, Droit des Gens*, §§ 91, 92; *Heffter, Droit International*, §§ 28, 53; *Martens, Recueil. Supplém.*, tome 4, pp. 33-340; *Martens, Guide Diplomatique*, § 64; *Garden, De Diplomatie*, tome 1, p. 355.)

§ 9. The title of emperor, from the historical associations connected with it, was formerly considered as the most eminent and honorable among all sovereign titles; but it is not now regarded by other crowned heads as conferring any prerogative or precedence over monarchical sovereigns of another name, ruling states of equal rank and dignity. The title of king is now considered as equal in every respect to that of emperor. In fine, the influence and importance of the sovereign, result rather from the rank and importance of the state, than from the name and nature of the title conferred upon its ruler. (*Wheaton, Elem. Int. Law*, pt. 2, ch. 3, § 6; *Martens, Precis du Droit des Gens*, § 127; *Klüber, Droit des Gens Mod.*, § 95; *Vattel, Droit des Gens*, liv. 2, ch. 3, § 40; *Polson, Law of Nations*, sec. 5; *Martens, Guide Diplomatique*, §§ 65, 66.)

§ 10. Among monarchical sovereigns, those who enjoy royal honors, but are not crowned heads, concede the preference, on all occasions, to emperors and kings; and the princes who do not enjoy royal honors, yield the precedence to those who are entitled to them. This rule is based on the consent of the parties themselves, and does not extend to their intercourse with other states. That is, a state whose ruler does not wear a crown, may give precedence to one which does, but this concession does not preclude the same state from claiming equal rank with a third power which contests the right of precedence with the state to which it had yielded that honor. (*Wheaton, Elem. Int. Law*, pt. 2, ch. 3, § 8; *Klüber, Droit des Gens*, pt. 2, tit. 2, ch. 3, § 98; *Polson, Law of Nations*, § 5; *Phillimore, On Int. Law*, vol. 2, § 41; *Martens, Guide Diplomatique*, §§ 65, 66; *Heffter, Droit International*, § 53.)

§ 11. In all matters of ceremony and etiquette, the representatives of semi-sovereign or dependent monarchical states rank below the representatives of sovereign and independent

monarchical states, and, of course, and as a matter of necessity, below those of the state on which they are dependent, or whose protection or *suzeraineté* they claim or acknowledge. But where third parties are concerned, their relative rank must be determined by other considerations; and they may even take precedence of states completely sovereign, as was the case with the electors under the former constitution of the Germanic empire, in respect to other princes not entitled to royal honors. (*Wheaton, Elem. Int. Law*, pt. 2, ch. 3, § 3; *Heffier, Droit International*, §§ 28, 41, 53; *Polson, Law of Nations*, sec. 5; *Horne, on Diplomacy*, sec. 1; *Garden, De Diplomatie*, liv. 5, §§ 2 et seq.; *Martens, Manuel Diplomatique*, ch. 1.)

§ 12. It will be observed that these regulations for determining the relative rank of states, or of their representatives, established in part by usage and custom, and in part by the Congress of Vienna in 1815, relate exclusively to monarchical sovereigns. An abortive attempt was made at the same congress, to classify the different states of Europe, with a view to determine their relative rank. A committee was appointed for this purpose in December, 1814; their report was discussed in February, 1815, and its adoption indefinitely postponed, doubts having arisen with respect to the proposed classification, and especially as to the rank assigned to republics. It therefore appears that republics have no definitive rank assigned to them by the rules of ceremonial etiquette in Europe, in the intercourse of their representatives with those of monarchical sovereigns. (*Bello, Derecho Internacional*, pt. 1, cap. 18, § 3; *Wheaton, Elem. Int. Law*, pt. 2, ch. 3, § 3; *Klucher, Acten des Wiener Congresses*, tome 8, pp. 98–116; *Polson, Law of Nations*, sec. 5; *Phillimore, on Int. Law*, vol. 2, §§ 41, 43; *Martens, Precis du Droit des Gens*, §§ 133, 135.)

§ 13. It may be stated, as a general rule resulting from the natural equality of states as members of an universal community, and subject alike to the same general code of international jurisprudence, that all sovereign states, no matter what may be their form of government, are equal before the law, and no one can claim any superiority or precedence over another. Republics are, therefore, entitled to the same rank as monarchies, unless they themselves have yielded their natural right of equality and conceded the precedence



to others. Formerly, the Roman Republic considered all kings as very far beneath it; but when the monarchs of Europe found none but feeble republics to oppose, they disdained to admit them to an equality. Nevertheless, the powerful Republics of Venice and of the United Provinces assumed the honors of crowned heads. Cromwell would not allow the slightest mark of honor which had been paid to the representatives of the monarchy to be omitted toward those of the Republic of England. In the treaties between the French Republic and the other European Powers, it was expressly stipulated that the same ceremonials, as to rank and etiquette, which had been observed before the revolution of 1789, should be continued between them. The states of Europe observed the same rule toward the recent Republic of France. The United States of North America, the Germanic Confederation, and Switzerland (collectively, not in its individual cantons,) have been considered as entitled to the same rank as the monarchical states of Europe. (*Vattel, Droit des Gens*, liv. 2, ch. 3, § 38; *Wheaton, Elem. Int. Law*, pt. 2, ch. 3, § 3; *Phillimore, On Int. Law*, vol. 2, § 41; *Polson, Law of Nations*, sec. 5; *Wildman, Int. Law*, vol. 1, pp. 88, 88; *Martens, Precis du Droit des Gens*, § 133; *Garden, De Diplomatie*, tome 1, p. 367; *Martens, Guide Diplomatique*, tome 2, ch. 2; *Bello, Derecho Internacional*, pt. 1, cap. 18, § 3.)

§ 14. Where the rank of different states is equal or undetermined, resort has sometimes been had to the usage of the *alternat*, as it is called, by which the rank and places of different powers is changed from time to time, either in a certain regular order, or one determined by lot. Thus, in drawing up public treaties and conventions, it is the usage of certain powers to *alternate*, both in the preamble and the signatures, so that each power occupies, in the copy intended to be delivered to it, the first place. Another expedient, sometimes resorted to in order to avoid controversies respecting the order of signatures to treaties and other public acts, is that of signing, in the alphabetical order of the names of the respective states which are parties to these acts, the French alphabet being adopted for that purpose. Thus, at the Congress of Vienna, in 1815, the plenipotentiaries signed in the following order: Austria, Denmark, Espagne (Spain,)

France, Great Britain, Prussia, Russia, Sweden; but it was distinctly understood, at the time, that this practice was not to be taken as derogating from the ancient usage of the *alternat*. (*Wheaton, Elem. Int. Law*, part. 2, ch. 3, § 4; *Martens, Guide Diplomatique*, tome 1, §§ 37–41; *Polson, Law of Nations*, sec. 5; *Phillimore, On Int. Law*, vol. 2, §§ 42, 43; *Bello, Derecho Internacional*, pt. 1, cap. 18, § 3.)

§ 15. At one time the Latin language was used as a matter of general convenience in the diplomatic intercourse between the different nations of Europe. Toward the end of the fifteenth century, the preponderance of Spain contributed to the general diffusion of the Castillian tongue as the ordinary medium of political correspondence. This, again, in the age of Louis XIV., was superseded by the French language, which became the almost universal diplomatic idiom of the civilized world. The primitive equality of states authorized each nation to make use of its own language in treating with others, and this right is still preserved in the practice of many states; each carrying on its diplomatic correspondence in its own language, and treaties between them being written in their respective languages in parallel columns. Where the states which enter into negotiation or treaty have a common language, they generally make use of it in their transactions with each other. (*Phillimore, On Int. Law*, vol. 2, § 41; *Wheaton, Elem. Int. Law*, pt. 2, ch. 3, § 5; *Polson, Law of Nations*, sec. 5; *Horne, On Diplomacy*, § 50.)

§ 16. The usage of nations has established certain military and maritime ceremonials to be observed, either on the ocean between ships, or in ports between ships, and between ships and forts, or on land between armies, forts, military and naval officers, and in the military honors to be paid to high civil officers. Among these is the salute by striking the flag, or the sails, or by firing a certain number of guns, etc. These are matters of, perhaps, trivial importance in themselves, but their due observance facilitates the amicable intercourse of nations, and their neglect frequently leads to international differences, dissensions and enmities, which have sometimes terminated in long and bloody wars. (*Wheaton, Elem. Int. Law*, pt. 2, ch. 3, § 7; *Bynkershoek, de Dominio Maris*, cap. 2, § 4; *Martens, Precis du Droit des Gens*, § 158;

*Klüber, Droit des Gens Mod.*, §§ 117–122; *Phillimore, On Int. Law*, vol. 2, § 84; *Ortolan, Diplomatie de la Mer*, liv. 2, ch. 15; *Heffler, Droit International*, § 82; *De Cussy, Droit Maritime*, liv. 1, tit. 2, § 61.)

§ 17. Every sovereign state has the exclusive right, in virtue of its independence and equality, to regulate the ceremonies to be observed within its own territorial jurisdiction. This extends to the ceremonials between its own ships on the high seas, and to the honors to be rendered by them to foreign ships on the high seas, and to ships and to fortresses in foreign ports. Regulations for determining these ceremonies, and the reciprocal honors to be rendered by one nation to another, are established by municipal ordinances, by usage, and by the stipulations of treaties. (*Wheaton, Elm. Int. Law*, pt. 2, ch. 8, § 7; *Bynkershoek, De Dominio Maris*, cap. 2, § 4; *Martens, Precis du Droit des Gens Mod.*, § 159; *Klüber, Droit des Gens Mod.*, §§ 117–122; *Heffler, Droit International*, §§ 32, 197; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 11; *De Cussy, Droit Maritime*, liv. 1, tit. 2, § 62; *Ortolan, Diplomatie de la Mer*, liv. 2, ch. 15.)

§ 18. Questions of territorial jurisdiction, or dominion over the narrow seas, have not unfrequently given rise to contentions with respect to the maritime honors to be rendered to the flag of the state claiming such dominion, by the vessels of others who denied its pretensions to such supremacy. This kind of supremacy was claimed by Great Britain over the narrow seas, and by Denmark over the sound and belts at the entrance of the Baltic sea, and serious international difficulties resulted in former times with respect to the formalities and maritime honors required by these states, and the neglect or refusal of others to observe or render them. But these peculiar formalities, formerly required by particular states, in particular places where their dominion was disputed, are now, either entirely suppressed, or modified and regulated by treaty stipulations. (*Phillimore, On Int. Law*, vol. 2, § 44; *Wheaton, Elm. Int. Law*, pt. 2, ch. 3, § 7; *Schlegel, Staats Recht des K. D.*, Th. 1, p. 412; *Martens, Nouveau Recueil*, tome 8, p. 72; *Ortolan, Dip. de la Mer*, liv. 2, ch. 15; *Chitty, Commercial Law*, vol. 2, p. 324; *Heffler, Droit Interna-*

*tional*, § 197; *De Cussy, Droit Maritime*, liv. 1, tit. 2, § 62; liv. 2, ch. 29; *Garden, De Diplomatie*, liv. 3, § 2.)

§ 19. Not only in the narrow seas, but also upon the ocean, when the ships of different nations happened to meet, serious questions sometimes arose with respect to the time and character of reciprocal salutes. Ortolan has given us numerous instances of these difficulties and disputes, which not unfrequently terminated in actual war. As the lowering of the flag was considered an act of humiliation, the custom was entirely dispensed with about the middle of the eighteenth century, and salutes were confined to the firing of cannon. Nevertheless, the vessels of the great powers for a long time refused to salute those of the smaller states, and those of crowned-heads, on entering ports and harbors of republics, required the forts of the latter, (contrary to ordinary rule,) to salute first. Thus the ordonnance of Louis XIV., published April 15th, 1689, directed French ships of war to require salutes from foreign vessels, "in whatever seas, or on whatever coasts they might meet." French ships of war, carrying the flag of admiral, vice admiral, rear admiral, "corvettes et flammes," were to salute first the maritime places and principal fortresses of *kings*; that the places of Corfu, Zante, and Cephalonia, belonging to the Republic of Venice, and those of Nice and Villafranca, belonging to the Duke of Savoy, were to be saluted first by vessels carrying the flag of a vice admiral; but they were to require the other places and principal forts of all other *princes* and *republics* to salute first the admiral and vice admiral. As early as 1667, the French fleet had required the fortress of Leghorn to salute first, but the Grand Duke of Tuscany had protested against this pretention. All French vessels carrying flags inferior to those of admiral and vice admiral, were to salute first maritime places and principal fortresses. Where the first salute was given by an admiral or vice admiral, it was to be returned gun for gun; where given by a vessel of lower grade, it was to be returned by a less number of guns, according to the rank of the commander. A return salute by a vice admiral, was to be given gun for gun. Other sovereigns made pretensions equally absurd against the smaller powers. The King of Spain, Philip II., forbid all Spanish vessels carrying the arms of Spain, to lower

their flag to foreign vessels, or to first salute the cities and fortresses of other sovereigns. But all these pretensions were finally abandoned in the course of the eighteenth century, and vessels of different states saluted each other without any reference to the relative character or power of their several governments, the salutes being, by general consent, divested of all idea of domination or supremacy. (*De Cussy, Droit Maritime*, liv. 1, tit. 2, § 62; liv. 2, ch. 28; *Ortolan, Diplomatie de la Mer*, liv. 2, ch. 15; *Cleirac, Us et Coutumes de la Mer*, p. 513; *Bouchard, Theorie des Traités de Commerce*, p. 427; *D'Hauterive et de Cussy, Recueil de Traités, etc.*, tome 2, pt. 5, p. 70; *Martens, Précis du Droit des Gens*, § 158-160; *Martens, Guide Diplomatique*, § 68; *Garden, De Diplomatie*, tome 1, pp. 406, et seq.; *Heffler, Droit International*, § 197.)

§ 20. Of the treaties entered into between different states, respecting salutes, we will refer to the following. By article nineteen of the treaty of August 30th, 1721, between Russia and Sweden, it was stipulated that there should be a reciprocity in the number of guns to be fired by vessels passing Russian and Swedish fortresses. By the treaty of January 11th, 1787, between France and Russia, it was stipulated that, in order to avoid all the difficulties to which the flags and different grades of officers might give rise, there should be no salutes between the vessels of the two nations, either on the high seas or in port. By article ten of the treaty of January 17th, 1787, between Russia and the Two Sicilies, it was stipulated that there should be a perfect equality between the two powers, with respect to maritime salutes. Two vessels meeting upon the high sea, that commanded by an officer of the lower rank was to salute first, the salute to be returned gun for gun; if the commanders should be of equal rank, no salute was to be given by either party. In entering a port where there was a garrison, the usual salute was to be given, and returned gun for gun; "excepting, however, the residence of the respective sovereigns, where, according to general usage, this salute is not given by either party." By the treaty of November 11th, 1730, between Russia and Denmark, concluded for an unlimited time, it was stipulated that Danish vessels should salute first in the North Sea and the White Sea, and that Russian vessels should salute first in

the Categat, and on coasts of Norway. By the treaty of 1809, between Russia and Sweden, it was stipulated that salutes upon the sea should be according to the rank of the respective officers, the lowest saluting first, and the other returning gun for gun; that vessels entering ports, or passing castles or forts, should salute first, the return salute being gun for gun. The same stipulations had been made in the treaty of 1798, between Russia and Portugal. By the treaty of 1827, between Great Britain and Brazil, it was stipulated that the salute should "conform to the rules observed between the maritime powers." By the treaty of 1829, between Russia and Denmark, it was stipulated that vessels of war should continue to salute ports or batteries, the salute to be returned gun for gun; but that they were not to salute other vessels of rank inferior to an admiral, and that the return salute by an admiral was to be *less two guns*, and by a grand admiral *less four guns*.

In addition to these and other stipulations of treaties, by which all difficulties are obviated with respect to salutes between the contracting powers, there has been a gradual tendency among maritime states to adopt a uniform system, by assimilating their internal laws and ordinances by which their salutes are regulated. Moreover, publicists have discussed the character and object of these usages, and sought to deduce from reason certain general principles which should form the basis of all internal regulations, and thus remove all cause of difficulty or dispute. (*De Cussy, Droit Maritime*, liv. 1, tit. 2, § 62; *Ortolan, Diplomatie, de la Mer*, liv. 3, ch. 15; *Heffter, Droit International*, § 197; *Martens, Guide Diplomatique*, § 68; *D'Hauterwe and De Cussy, Recueil de Traités*, tome 2, pt. 2, p. 70; *Klüber, Droit des Gens*, § 117; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, ch. 11.)

§ 21. The following general rules are collected from the best authorities on international jurisprudence :

As already stated, the method of saluting by striking or furling the flag, is now entirely abandoned between ships of war, although merchant vessels, as a mark of deference, sometimes salute in this way the men-of-war of their own state. But Ortolan considers even this as an objectionable practice, because the national flag should be considered as a

sacred emblem, and should never be lowered voluntarily, not even through deference and as a matter of politeness. A salute by lowering the sails is more suitable and much less objectionable; it is sometimes used by merchant vessels. Merchant vessels of different nations, meeting on the high seas, or in port, do not, as a general rule, salute each other; sometimes, however, they exchange compliments by lowering their national flags. This, for the reason given above, is by some regarded as an objectionable practice. Such salutations should be confined to private signals, or to the sails.

All sovereign states are, with respect to salutes, to be regarded as equal; and any inequality of salutes, in respect to time, place, form, or number of guns, is to be regarded as resulting from general agreement, or of individual rank of the parties saluting, and not as conveying any idea of domination or supremacy. Salutes are never, in the absence of treaty stipulations, to be regarded as obligatory, but as a matter of courtesy and etiquette. To refuse an exchange of salutes is therefore regarded as evidence of a want of friendship and good will, which justifies the other party in asking explanations; but it cannot in itself be considered an offense or an insult, sufficient to justify hostilities.

Where two ships of war meet upon the high seas, courtesy requires that the commanding officer lowest in rank shall salute first, and that the salute be returned, gun for gun. The same rule holds with respect to the flag-ships of squadrons; but a single ship, no matter what its rank, meeting a squadron, salutes first. Vessels carrying sovereigns, members of royal families, rulers of states, and ambassadors, are to be saluted first. As before remarked, only personal salutes can be returned by a less number of guns. (*De Cussy, Droit Maritime*, liv. 1, tit. 2, § 62; *Heffter, Droit International*, § 197; *Ortolan, Diplomatie de la Mer*, liv. 3, ch. 15; *Martens, Guide Diplomatique*, § 68; *Martens, Volkerrecht*, § 155; *Nau, Volkerseerecht*, § 139, et seq.; *Klüber, Droit des Gens*, § 121; *Riquelme, Derecho, Pub. Int.*, liv. 1, tit. 2, ch. 11.)

§ 22. Vessels of war, in entering or leaving foreign ports, or in passing foreign forts, batteries, or garrisons, salute first, without reference to the relative rank of the officers of the

ships and forts. Such salutes are always to be returned gun for gun. As messages are to be exchanged between the parties, with respect to the number of guns to be given and returned, such salutes are usually fired after the vessel comes to anchor, and before leaving her anchorage on her departure. This salute is a compliment to the flag, and, consequently, is considered international rather than personal. The same rule holds with respect to the interchange of compliments and visits with the authorities on shore; the compliment or visit being first made from the vessel, without regard to relative rank, even if it were possible to fix any relative rank for officers so different in their nature and character. The rule, making such compliments international, avoids any necessity of attempting such assimilation.

An apparent exception is made to this rule, in the case of vessels carrying persons of sovereign rank, members of the royal family, or ambassadors representing sovereigns or sovereign states. In such cases, the forts, batteries and garrisons, always salute first. But such salutes are intended expressly for the persons carried, and not for the vessel carrying them, and, consequently, the vessel does not return the salute. It is customary, however, for such vessel, if foreign, to afterward salute the fort or garrison in the usual manner, which salute is, of course, to be returned gun for gun. Ambassadors visiting foreign ports, not the capital or seat of the court of a sovereign or a sovereign state, first receive the visits and compliments of the local authorities. This rule of courtesy results from their supposed representative character. The rules of etiquette to be observed with respect to ambassadors at foreign courts, have already been discussed in another chapter. Where vessels of war, in foreign ports, land or receive on board their own sovereigns, or officers of their own government, the salutes to be given and ceremonies to be observed, are to be determined by their own laws and regulations. The same remark applies to the compliments to be paid on such occasions by other ships in port, and by the military establishments on shore, each being governed by their own laws and regulations. Every country determines for itself the salutes to be paid to its own authorities, and it will hardly be expected that any higher compli-



With respect to saluting the flags of other powers, at sea or in port, the orders direct, that "all salutes from ships of war, of other nations, either to Her Majesty's forts or ships, are to be returned, gun for gun. A British ship, or vessel of war meeting at sea a foreign ship-of-war, bearing the flag of a flag officer, or the broad pendant of a commodore commanding a station squadron, and superior in rank to the officer of the British ship or vessel, shall salute such foreign flag-officer or commodore with the number of guns to which a British officer of corresponding rank is entitled, on being assured of receiving in return gun for gun; and in the event of a British ship meeting with such foreign flag-officer, or commodore, in a foreign port, similar complimentary salutes with such foreign flag-ship should be observed, if the regulations of the place shall admit thereof." (*Phillimore, On Int. Law*, vol. 2, §§ 86, 87; *Prendergast, Law relating to the Officers of the Navy*, pt. 2, p. 449; *Jenkins, Life of Sir Leoline*, vol. 1, p. 97; *The Minerva*, 3 *Rob. Rep.*, p. 34; *The King v. Miller*, 1 *Hag. Rep.*, p. 197; *The King v. Benson*, 3 *Hag. Rep.*, p. 96.)

§ 25. French naval regulations, established by the decree of August 15th, 1851, are also very minute on all matters of ceremony, and seem admirably adapted to their purpose. Article seven hundred and thirty-nine prescribes the mode of celebrating national fêtes, whether French, or of foreign nations, in foreign ports, and directs that, "in all cases, the superior commander shall conform, as far as possible, in these ceremonies, to the usages of the place." Article seven hundred and forty-one provides that, on the high seas, or in foreign ports, the officer commanding one or more vessels of war will salute the distinctive mark of the commanders-in-chief of foreign vessels, conforming the salute to the usages of the military marine of such foreign vessels, first being assured of a reciprocity. Article seven hundred and forty-three directs, that in entering a foreign port, the vessel will first salute the place, and afterward the ships of war at anchor, first ascertaining that the salutes will be returned, gun for gun. Article seven hundred and forty-three directs, that salutes of foreign ships of war shall be returned, gun for gun, whatever may be the rank of the officers commanding, provided the salute does not exceed twenty-one guns. The salutes

of foreign merchant vessels are to be returned by French ships of war, less two guns. Article seven hundred and forty-four says: "Personal salutes are not given; nevertheless, in this respect, the usages and precedents of the country where the vessel is may be followed." Article seven hundred and forty-five prescribes the disposition to be made, in a foreign port, of the French flag, and that of the foreign power, while saluting and celebrating national fêtes. Article seven hundred and fifty-one prescribes in detail the ceremonies to be observed in exchanging visits of compliment with foreign vessels, and with the authorities on shore. A French vessel being in port will always send an officer with his compliments to the commander of a foreign vessel coming into the same port; if the foreign officer so arriving is of inferior rank, the French commander will wait to be visited, but, if the new-comer be of superior rank, the other will make the first visit of ceremony, after receiving a message of thanks for that of compliments previously sent. (*Phillimore, On Int. Law*, vol. 2, § 35; *Ortolan, Diplomatie de la Mer*, tome 1, p. 382, note, third edition; *Martens, Guide Diplomatique*, §§ 67–70; *Heffter, Droit International*, § 197; *De Cussy, Droit Maritime*, liv. 1, tit. 2, § 62.)

§ 26. Spanish legislation, with respect to maritime ceremonial, conforms in principle to the rules adopted by other maritime powers. In regard to salutes from Spanish ports to foreign vessels, by royal orders of August 15th, 1741, of July 2d, 1770, of December 5th, 1776, and of March 30th, 1838, it is provided, that, without changing the established usage of each port, foreign vessels of war which salute first, are to be saluted in return, gun for gun. With respect to Spanish vessels entering foreign ports, the *ordenanzas* of 1793 direct that the chiefs of vessels or squadrons shall, before entering, inform themselves of the practice observed there, and that they will salute on ascertaining that it will be returned, gun for gun; and, that if no custom has been established, they will enter into an agreement for such exchange of salutes, both in going into and coming out of foreign ports. By the same *ordenanzas* and royal order of February 7th, 1799, it is directed, that Spanish vessels, meeting other vessels on the high seas, or in foreign ports, are not to salute,

nor to require a salute ; but, if they should be saluted, they are to return it, gun for gun. Foreign vessels of war in Spanish ports are to salute only those of their own nation. By royal orders of January, 1826, and September 7th, 1828, it is directed, that Spanish ports, in which there are foreign vessels, shall, on the birth days of such foreign sovereigns, make the same salutes and demonstrations as are made on the birth days of Spanish sovereigns, provided that such foreign vessels extend the same courtesies on such Spanish festival occasions. (*Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, ch. 11 ; *Ordenanzas de la Armada*, passim.)

§ 27. The military regulations for the government of the army of the United States, determine with great minuteness the salutes and military honors to be paid by troops and forts to our civil, military, and naval officers, according to the rank of each. Thus, a national salute is determined by the number of states composing the Union, at the rate of one gun for each state. The President of the United States alone, is to receive a salute of twenty-one guns ; the Vice President, seventeen guns ; the heads of the executive departments of the federal government, the commanding general of the army, and the governors of states and territories, within their respective jurisdictions, fifteen guns ; major generals, and ministers to foreign states, thirteen guns ; brigadier generals, eleven guns ; and officers of the navy, according to their relative rank with officers of the army. The President and Vice President of the United States, are to be received by troops with standards and colors dropping, officers saluting, drums beating, and trumpets sounding. The compliments of other officers of government are varied according to the rank of each. Foreign officers, whether civil, military, or naval, when invited to visit a military post or national vessel, are to be saluted according to their rank, and to receive the same honors as officers of the United States of the rank which corresponds. Thus, a foreign sovereign prince receives the same honors as the President of the United States ; foreign ambassadors and ministers, the same as American envoys of corresponding rank to foreign courts, etc. Foreign ships of war, entering American ports, are saluted from fortifications in return for a similar compliment, gun for gun, on

notice being officially received of such intended salute. It is usual to agree beforehand what number of guns are to be fired, and it is directed that in no case shall the compliment exceed the national salute. Similar rules are established for the navy of the United States, with respect to salutes to be given to our own and foreign officers. American ships of war, on visiting foreign ports, salute fortifications on receiving notice that the compliment will be returned, gun for gun. Our ships salute each other and foreign ships, according to the rank of their respective commanders. (*U. S. Army Regulations*; *U. S. Navy Regulations*.)

§ 28. These rules, however just and proper in themselves, sometimes give rise to serious questions in their application to particular cases. Thus, should a *commodore*, or *flag officer*, who is the highest officer in the United States navy, receive the same honors as a British or French *admiral*, who has the same command, or only such as are due to a British or French *commodore*, who, although enjoying the same title, has an inferior command, and is, in fact, of inferior rank. Again, is a *general* of the highest rank in the United States army to receive the same honors as a British or French *marshal*, or only those of an inferior officer, who has the same title of general? Again, if a foreign sovereign prince should visit an American ship of war in one of his own ports, should he receive only the honors which such ship pays to the President of the United States, or the honors, perhaps, much higher, which would be due to him from one of his own ships? Such questions, although relating to mere matters of etiquette and ceremony, are sometimes of considerable importance, as promoting or disturbing relations of friendship. Where not arranged by some international agreement, they should be settled in each case by a mutual understanding, entered into beforehand, between the immediate parties who give and receive the salutes, and where no such agreement can be made, it is proper to abstain from all salutes, visits, and ceremonies.

A dispute of this kind, with respect to relative rank, occurred in the anchorage of Sacraficios, Mexico, between Vice Admiral Baudin, commanding the French ship *La Néréide*, and Commodore Shubrick, commanding the Amer-

ican sloop *Macedonian*. A similar difficulty, with respect to salutes, occurred at Toulon, in 1830, between Vice Admiral de Rigny, commanding the French ship *le Conquerant*, and the captain of an English frigate. (*Ortolan, Diplomatie de la Mer*, tome 1, liv. 2, ch. 15; *Blanchard et Dauzats, Relation de l'expédition F. au Mexique*, pp. 583–585; *Reports of the Sec. of the Navy*, Cong. Doc., 1841, etc.; *Cooper, Naval Hist. of the United States*, introduction.)

§ 29. It is hardly probable that different nations will ever assign the same names or grades to the officers of the same command, either upon land or in their respective naval forces. Difficult and embarrassing questions of rank and precedence will, therefore, necessarily arise, whenever they meet upon the high seas or in foreign ports. In the matter of salutes it would be easy to avoid any question of this kind, by considering all salutes as international, instead of personal, to the officer, according to his rank, such salutes being always returned gun for gun, as is now the practice between ships and forts. If the salute were considered as given to the *flag* borne by the ship instead of the *officer* commanding it, the salutes would necessarily be equal, and always the same, as the flag represents the state to which it belongs, and all sovereign and independent states are now considered, in international law, of equal dignity, in matters of ceremony. A similar rule might be applied to military salutes given to foreign officers on land, each officer entitled to a salute, being considered as representing the dignity of his state, whatever might be the name or rank conferred upon him by such state. The question of time as to which should salute first, would then be governed by the rules already established with respect to vessels of equal rank. (*Klüber, Droit des Gens*, § 121; *Nau, Volkerseerecht*, § 148; *Heffler, Droit International*, § 197; *Ortolan, Diplomatie de la Mer*, liv. 2, ch. 15; *Décret du 15 Août, 1851, Art. 749*; *Vide, Ante* § 22.)

## CHAPTER VI.

### RIGHTS OF PROPERTY AND OF DOMAIN.

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§ 1. Before proceeding to discuss the rights of property and domain, it may be proper to define what is understood by the property and domain of a state, as distinguished from the rights of sovereignty, and the powers and prerogatives of the sovereign or ruler.

As remarked in a preceding chapter, the *sovereignty* of a state is the collection of the wills and powers of all the individual members of which the state is composed. According to Grotius, Puffendorf, and more modern text-writers, this power has two subjects,—*common* and *proper*,—the former being the state itself or the community which constitutes the state, and the latter the person or persons in whom, by the organic laws, the power is vested; the former, being the source, is one and indivisible, while the latter may be one or many, and is frequently divided into *legislative*, *executive*, and *judicial*, each branch or division being separate and distinct, and sometimes entirely independent. The *sovereignty* of a state, is, therefore, its public power or authority, and the *sovereign* is the person, or body of persons, who are invested with that power or authority. If that power or authority remains in the community, the *common* and *proper* subjects are one and the same, and the government is a *democracy*; if vested in a number of individuals, it is an *aristocracy*; if in a single person, it is a *monarchy*. These simple forms are modified and varied, according to the organic laws of each state. (*Grotius, de Jur. Bel. ac Pac*, lib. 1, cap. 3, §§ 6, 7, 17; *Puffendorf, de Jur. Nat. et Gent.*, lib. 7, cap. 2, § 20; cap. 4, § 1; cap. 5, § 1; *Bowyer, Universal Pub. Law*, pp. 210–216; *Vattel, Droit des Gens*, liv. 1, ch. 1, §§ 1, 3; *Garden, De Diplomatie*, tome 1, pp. 106, 110; *Martens, Precis du Droit des Gens*, § 23; *Rayneval, Institutions du Droit*, tome 1, p. 44; *Ortolan, Diplomatie de la Mer*, tome 1, pp. 11, 12; *Wheaton, Elm. Int. Law*, pt. 1, ch. 2, § 5; *Ortolan, Domaine International*, pp. 16 et seq.; *Heffler, Droit International*, §§ 16–25; *Burlamaqui, Droit de la Nat. et des Gens*, tome 4, pt. 2, ch. 5; *Merlin, Repertoire, verb. Souveraineté*; *Dalloz, Repertoire verb. Souveraineté*; *Proudhon et Dumay, Domaine Public*, tome 1, ch. 7.)

§ 2. The term *prerogative* is frequently used to express the uncontrolled will of the sovereign power in the state. It is applied not only to the king, but also to the legislative and judicial branches of a government, as the “royal prerogatives,” the “prerogatives of parliament,” the “prerogatives of the court,” etc. Rutherford says, prerogative simply means a power or will which is discretionary, and above and uncontrolled by any other will, and, that if this power be

limited in any respect, so far the prerogative is at an end. In speaking of the royal prerogative, Blackstone says: "It signifies, in its etymology, (from *prae* and *rogo*,) something that is required or demanded before or in preference to all others. And hence it follows that it must be in its nature singular or eccentric; that it can only be applied to those rights and capacities which the king enjoys alone, and in contradistinction to all others, and not to those which he enjoys in common with his subjects; for if once any one prerogative of the crown could be held in common with the subject, it would cease to be prerogative any longer. And, therefore, Finch lays down as a maxim, that the prerogative is that law, in case of the king, which is law in no case of the subject."

But this word, which properly signifies power or will, is sometimes applied by law writers to the *thing* over which that power or will is exercised. Thus, the king's revenue is sometimes called the king's *fiscal prerogatives*; moreover, the sources of that revenue are, by an elliptical expression, sometimes called prerogatives. Thus, the rents and profits of the demesne lands of the crown, and even the lands themselves, have been classed as prerogatives of the crown. So of forfeited lands, mines of gold and silver, treasure-trove, waifs, estrays, etc. But these are *things* and not *powers*; they may belong to the king *by virtue* of his prerogatives, and be held by him as the property of the crown *by virtue* of his sovereignty, as well as by any other right of property, but they are themselves neither prerogatives nor sovereignties. It is necessary to bear in mind the distinction between the right of property, or property itself, and the origin or source of that right. (*Tomlins, Law Dictionary, verb. prerogative; Rutherford, Institutes, b. 2, ch. 3, § 10; Blackstone, Commentaries, vol. 1, pp. 239, et seq.; Merlin, Repertoire, verb. souveraineté; Dallaz, Repertoire, verb. prerogative; Bouvier, Law Dictionary, verb. prerogative.*)

§ 3. The word *majestas* was used by the Romans to express the supreme dignity of the commonwealth, and hence *majestas*, as employed by the civilians, is a legal term signifying *the sovereign dignity of the state*; and the different powers of the state, or parts of sovereign power, are called by them *jura majestatis*. They very properly distinguish between things,



and rights to things, the former being called *corpora*, and the latter *jura*. "Upon the breaking up of the Roman empire," says Gamboa, "the princes and cities, which declared themselves independent, appropriated to themselves those parts in which nature, most rich and liberal, yields extraordinary products. These portions, or reserved rights, were called *regalias*." The same writer, in other places, applies the term *regalia* both to rights to things, and to the things themselves,—to *jura and corpora*. So of the feudal and English law writers. They sometimes apply this term to things, as the crown, and sceptre, and royal and church lands, and sometimes to the dignity, power and pecuniary rights of the king. When applied to the power and dignity of the king, they are called *majora regalia*, and when applied to his fiscal rights, they are called *minora regalia*. The former, says Erskine, are not alienable without the consent of parliament, while the latter may be communicated to his subjects by the sovereign himself, at his pleasure. The term *regalia*, therefore, differs from sovereignty, or *jura majestatis*, as being applicable both to things and to rights to things,—*corpora* and *jura*,—and, also, as not being inherent to or inseparable from the sovereign power, for *regalia* may be alienated, either with or without the consent of parliament. It may be applied to the rights and prerogatives, not only of the king, but also of the church, the treasury, the courts, and parliament, and also to property of the state, of the church, etc. And when applied to property, it may include both that which necessarily appertains to the crown, and that which is alienable, or which may be passed to individual subjects. (*Bowyer, Universal Public Law*, p. 217; *Voet, ad Pandec.*, lib. 4, tit. 4, § 2; *Justinian, Digest*, 48, tit. 1, §§ 1, 2; *Gamboa, Commentarios*, cap. 2, §§ 4, 16, 21, 24; *Dou, Derecho Publico General*, lib. 1, tit. 9, cap. 5; *Erskine, Institutes*, pp. 323 et seq.; *Blackstone, Commentaries*, vol. 1, pp. 241, 306; *Tomlins, Law Dic.*, verb. *Regalia*; *Merlin, Rep. de Jurisprudence*, verb. *Droits Regaliens*; *Delebecque, Legislation des Mines, etc.*, tome 1, p. 17.)

§ 4. By the term *property*, we understand the ownership of a thing, or the exclusive right of possessing, enjoying and disposing of it. Things owned by individuals, or corporate bodies, are termed *private property*, and those owned by the

state are called *public property*, or the property of the state. The property of a state is therefore very different from its sovereignty, or the prerogatives of its ruler. In speaking of real property, whether of individuals or of states, the term *domain* is frequently used. "A distinction," says Bouvier, "has been made between *property* and *domain*. The former is said to be that quality which is conceived to be in the thing itself, as it is considered as belonging to such or such person exclusively of all others. By the latter is understood that right which the owner has of disposing of the thing. Hence, domain and property are said to be correlative terms; the one is the active right to dispose, the other a passive quality, which follows the thing and places it at the disposition of the owner. But this distinction is too subtle for practical use." The term domain, as applied to the property of a state, is divided by Proudhon into two classes: "The *public domain*, which applies to that kind of property which the government holds as a mere trustee for the use of the public, such as public highways, navigable rivers, salt springs, etc., and which are not, as of course, alienable; and the *domain of the state*, which applies only to things in which the state has the same absolute property as an individual would have in like cases." Although these particular terms are not in general use with us, we nevertheless distinguish between the terms "public lands" and lands which have been purchased or reserved for any particular use of the government, or of one of its departments, for laws relating to "public lands" do not apply to lands so purchased or reserved. Ortolan distinguishes between the property which the state holds by virtue of its interior laws, and that which it holds by virtue of its international rights under the law of nations. The right of the state to the former is said to be *absolute* as against everybody, while its right to the latter may be absolute only as against other states, and merely *paramount* when considered with respect to its own members and their rights of property in the same things. The former, Ortolan calls the *private or public domain of the state*, ("domaine privé, ou domaine public de l'état,") and the latter he calls *international domain*, or *property between states*, ("domaine international, ou propriété d'état à état.") (*Proudhon et Du-*

may, *Domaine Public*, tome 1, chs. 14, 15; *Hautefeuille, Des Nations Neutres*, tit. 1, ch. 1, secs. 1, 3; *Riquelme, Derecho Publico Int.*, lib. 1, tit. 1, sec. 1, cap. 2; *Vattel, Droit des Gens*, liv. 1, ch. 20, §§ 235, 244; *Ortolan, Domain International*, §§ 13, et seq.; *Wheaton, Elem. Int. Law*, pt. 2, ch. 4, §§ 2, 3; *Rutherford, Institutes*, vol. 2, ch. 9, § 6; *Polson, Law of Nations*, sec. 5; *Kent, Com. on Am. Law*, vol. 2, p. 339; *American Jurist*, No. 37, p. 121; *Bouvier, Law Dictionary*, verb. domain; *Crittenden, Opinions U. S. Attys. Gen.*, vol. 5, p. 578; *Cushing, Opinions U. S. Attys. Gen.*, vol. 6, p. 670; *Wilcox v. Jackson*, 13 Peters' Rep., p. 513.)

§ 5. The term *dominium*, as used by the civilians, when applied to property, has several significations. Erskine says: "The interest which the superior retains to himself in all feudal grants, is called *dominium directum*, because it is the highest and most eminent right, and that which the vassal acquires, goes under the name of *dominium utile*, as being subordinate to the other." The full and absolute ownership, *dominium plenum*, includes both the *directum* and the *utile*. The term *dominium eminens* is not, properly speaking, property, but a right of the state over the property of individuals. It is defined in Cooper's Justinian, "the right of the public, in cases of emergency, to seize upon the property of individuals, and convert it to the public use." Bowyer says, the *jus eminens* "is that right which the entire body has over the members and whatever belongs to them, and which, being for the common good, is superior to the private rights of individuals belonging to their private interests. This *jus eminens* is called by writers on public law *dominium eminens*, when it regards property. It is the right of the state, or the sovereign power, over property within it, when necessity or the public good requires. This is the true foundation of the right of taxation." Again, he says the right called *dominium eminens* "is a part of the sovereign authority, and one of the *jura majestatis*." Vattel defines *dominium eminens*, or *eminent domain* to be, "the right which belongs to the society or the sovereign, of disposing, in case of necessity and for the public safety, of all the wealth contained in the state." But this definition is obviously defective and incorrect. Chancellor Walworth says: "All separate interests of indi-

viduals in property are held of the government," and "notwithstanding the grant to individuals, the *eminent domain*, the highest and most exact idea of property, remains in the government, or in the aggregate body of the people in their sovereign capacity, and they have a right to resume the possession of the property in the manner directed by the constitution and laws of the state, whenever the public interest requires it. This right of resumption may be exercised not only where the safety, but also where the interest, or even the expediency of the state is concerned; as where the land of the individual is wanted for a road, canal, or other public improvement."

It is seen, from these definitions, that the term *eminent domain* is applied to one of the *jura majestatis*; it is that highest right over property which is in the government, and is never granted to the individual, and, therefore, is essentially different from what is ordinarily understood by the word property. The term *eminent domain*, properly speaking, is not applicable to the property of the state, but only to the property of individuals, for the right of the state to dispose of its property results from its right of ownership, and not from the right of eminent domain, which latter right remains in the state after it has transferred the ownership of its property. It is a right which, from its very nature, is inseparable from the sovereignty, and is necessarily transferred with the sovereignty. (*Erskine, Institutes*, pp. 231, 312; *Cooper, Justinian*, p. 442; *Bowyer, Universal Public Law*, pp. 227, 372; *Vattel, Droit des Gens*, liv. 1, ch. 20, § 244; *Bouvier, Law Dictionary*, verb. *eminent domain*; *Domat, Des Loix Civiles*, lib. 1, tit. 2, sec. 13; *Sedgewick, Stat. and Con. Law*, pp. 500, et seq.; *Beekman v. S. S. R. R. Co.*, 3 *Paige Rep.*, p. 73; *Varrick v. Smith*, 5 *Paige Rep.*, p. 159; *Pollard's Lessee v. Hagan*, 3 *Howard Rep.* p. 223; *Bello Derecho Internacional*, pt. 1, cap. 4, § 1; *Riquelme, Derecho Publico Int.*, lib. 1, tit. 1, cap. 2; *Burlamaqui, Droit de la Nat. et des Gens*, tome 4, pt. 2, ch. 5; *Gilmer v. Lime Point, Cal. Rep.*, April term, 1861; *American Law Reporter*, vol. 19, pp. 254, et seq.)

§ 6. A state, being regarded in public law as a body politic, or distinct moral being, naturally sovereign and independent, it is considered as capable of the same rights, duties and

obligations, with respect to other states, as individuals with respect to other individuals. Among the most important of these natural rights, is that of acquiring, possessing and enjoying property. And this right applies not only to property of the state, as exclusive of other states, but to such property as exclusive of individuals. But international law generally considers only the former kind of property, or international domain. When, however, we consider the rights of conquest and cession, the rights of maritime capture and of capture on land, it becomes necessary to consider the interior or municipal rights of property in the state, and to distinguish between the absolute and paramount rights of the state, in respect to property considered in its interior relations under municipal laws, rather than its exterior relations under international laws. As a general rule, the property of a state, of whatsoever description, is marked by the same characteristics relatively to other states, as the property of individuals relatively to other individuals; that is to say, "it is exclusive of foreign interference, and susceptible of free disposition." (*Ortolan, Domain International*, §§ 15-22; *Martens, Precis du Droit des Gens*, § 34; *Heffler, Droit International*, §§ 64, 69, 70; *Phillimore, On Int. Law*, vol. 1, § 150; *Polson, Law of Nations*, sec. 5; *Wheaton, Elem. Int. Law*, pt. 2, ch. 4, § 1; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 2; *Burlamaqui, Droit de la Nat. et des Gens*, tome 4, pt. 3, ch. 5.)

§ 7. A state may acquire property or domain in various ways; its title may be acquired originally by mere occupancy, and confirmed by the presumption arising from the lapse of time; or by discovery and lawful possession; or by conquest, confirmed by treaty or tacit consent; or by grant, cession, purchase, or exchange; in fine, by any of the recognized modes by which private property is acquired by individuals. It is not our object to enter into any general discussion of these several modes of acquisition, any further than may be necessary to distinguish the character of certain rights of property which are the peculiar objects of international jurisprudence. (*Wheaton, Elem. Int. Law*, pt. 2, ch. 4, §§ 1, 4, 5; *Phillimore, On Int. Law*, vol. 1, § 221-277; *Grotius, de Jur. Bel. ac Pac.*, lib. 2, cap. 4; *Vattel, Droit des Gens*, liv. 2, chs. 7 and 11; *Rutherford, Institutes*, b. 1, ch. 3; b. 2,

ch. 9; *Puffendorf, de Jur. Nat. et Gent.*, lib. 4, chs. 4, 5, 6; *Moser, Versuch, etc.*, b. 5, cap. 9; *Martens, Precis du Droit des Gens*, § 35, et seq.; *Schmaltz, Droit des Gens*, liv. 4, ch. 1; *Klüber, Droit des Gens*, §§ 125, 126; *Heffter, Droit International*, § 76; *Ortolan Domaine International*, §§ 53, et seq.; *Bowyer, Universal Public Law*, ch. 28; *Bello, Derecho Internacional*, pt. 1, cap. 4; *Riquelme, Derecho, Pub. Int.*, lib. 1, tit. 1, cap. 2; *Burlamaqui, Droit de la Nat. et des Gens*, tome 4, pt. 3, ch. 5.)

§ 8. A sovereign state has the same absolute right to dispose of its territorial or other public property, as it has to acquire such property, but it depends upon its own municipal constitution and laws, how, and by what department of its government, the disposition shall be made. This is sometimes a question of peculiar interest to foreign states, who may acquire such property by purchase, exchange, cession, conquest, and treaties of confirmation, and especially where such acquisitions are made from states continually subject to revolutions and fluctuations in the character of its government and in the powers of its rulers. The act of a government *de facto*, a government which is submitted to by the great body of the people, and recognized by other states, is binding as the act of the state; and it is not necessary for others to examine into the origin, nature and limits of that authority. If it is an authority *de facto*, and *sufficient* for the purpose, others will not inquire how that authority was obtained. (*Phillimore, On Int. Law*, vol. 1, §§ 283, et seq.; *Kent, Com. on Am. Law*, vol. 1, p. 166; *Webster to De la Rosa*, Aug. 25th, 1851; *Cong. Doc.*, 32d Cong., 1st sess. Senate, Ex. Doc. No. 97; *Bello, Derecho Internacional*, pt. 1, cap. 4, § 2; *Heffter, Droit International*, § 71; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 2.)

§ 9. Nevertheless, in order to make such transfer valid, the authority, whether *de facto* or *de jure*, must be competent to bind the state. Hence the necessity of examining into and ascertaining the powers of the rulers, as the municipal constitutions of different states throw many difficulties in the way of alienations of their public property, and particularly of their territory. Especially, in modern times, the consent of the governed, express or implied, is necessary, before the

transfer of their allegiance can regularly take place. But formerly, what Grotius calls *patrimonial kingdoms* were considered in the light of absolute property of particular families, who, having received the blind submission of their subjects, sold and bartered them away, like any other property which they possessed. And such transfers of sovereignty included, not only the right of eminent domain, and the absolute property of the sovereign or state, but all private lands, and the property and services of the subjects, who were transferred with the soil, in the same manner as a slaveholder may transfer his slaves and all they possess, together with the title to his plantation. (*Grotius, De Jur. Bel. ac Pac.*, lib. 3, ch. 11, § 4; *Ward, Law of Nations*, vol. 2, pp. 256–258; *Bello, Derecho Internacional*, pt. 2, cap. 4, § 2; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 2.)

§ 10. There are numerous examples of such treaties of sale. In 1301, Theodoric, Landgrave of Thuringia, sold the Marquisate of Lusatia to Burchard, Archbishop of Magdeburg, for six hundred marks of silver,—“insuper cum ministerialibus, Vasalis et Mancipiis, et aliis hominibus cujuscunque conditionis in jam dicta terra commorantibus,” etc. In the same manner, in 1311, Dantzic, Derschovia and Swiecae, were sold by the Margrave of Brandenburg to the Grand Master of the Teutonic Order, for ten thousand marks. In 1333, the city and territory of Mechlin was transferred for one hundred thousand reals of gold, by a treaty of sale between its sovereign and the Earl of Flanders, the fealty being reserved. About the same time, the city and county of Lucques were sold by John of Luxemburg to Philip of Valois, for one hundred and eighty thousand florins; and a few years after, the sovereignty of Frankenstein was sold by the Duke of Silecia, for two thousand marks, to the king of Bohemia. The sovereignty which the Popes so long held over Avignon was purchased by Clement VI., for eighty thousand florins, from Jane, Queen of Naples and Countess of Provence. (*Ward, Law of Nations*, vol. 2, pp. 258–260; *Dumont, Corps Dip.*, liv. 2, pp. 330, 364, 365; *Dupuy, Droits de Roy F. C.*, p. 70; *Leibnitz, Cod. Dip.*, p. 200; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 2.)

§ 11. The practice also extended to the mortgaging of sovereignties, and the sales of reversionary interests in kingdoms. Thus, Robert, duke of Normandy, in order to raise money to engage in the first crusade, mortgaged his dutchy for six thousand six hundred and sixty-six pounds weight of silver, to his brother William, and transferred the possession before his departure for the holy land. In 1479, Louis XI. bought the right of the house of Penthievre, the next male heirs in reversion, to Brittany. And fifteen years later, Charles VIII. purchased, for an annual pension of four thousand three hundred ducats, an estate of five thousand, in lands in France or Italy, and the disposition of the Morea (when conquered,) of Paleologus, the nephew of Constantine, the last Christian emperor, his right to the whole empire of Constantinople. The act of sale being drawn up by two notaries, and ratified, Charles assumed the robes and ornaments of the imperial dignity, and made no scruples in claiming the imperial rights vested in him by virtue of this purchase. (*Ward, Law of Nations*, vol. 2, pp. 260–262; *Garnier, Hist. de France*, liv. 1, pp. 429, 461, 494; *Russell, Hist. Modern Europe*, vol. 1, pp. 185, 472; *White, Hist. of France*, p. 208.)

§ 12. It was also the custom to dispose of sovereignties and dominions by deeds of gift, and by bequests. The emperor Lewis V., created the dauphin Humbert *king*, with the full privilege of disposing of his sovereignty at will, during life, or at his death. In 1343, Humbert ceded his dominions to Philip of Valois, by solemn deed of gift. By similar deeds, and upon a like principle, the emperor Henry VI. conferred upon Richard I. the kingdom of Arles, and the emperor Baldwin gave to the duke of Burgundy the kingdom of Thessalonica. By bequests, not only were whole sovereignties disposed of, but the orders of succession were frequently changed. Thus, Charles II., king of Sicily and count of Provence, changed by will the order of succession to the county, and the claims of Charles VIII. to the throne of Naples were founded upon the adoption of Louis of Anjou, by Jane, queen of Naples, in 1380, which was evidenced to all Europe by a solemn and public deed. (*Ward, Law of Nations*, vol. 2, pp. 262–264; *Leibnitz, Cod. Dip.*, pp. 51, 237, 158, 220, 382; *Pfelfel, Droit Pub. d'Allemagne*, tome 1, p. 541; *Henault, Hist.*

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*Chron.*, tome 1, p. 315; *Dumont, Corps Dip.*, tome 1, pp. 288, 337, 362.)

§ 13. National territory consists of water as well as land. The maritime territory of every state extends to the ports, harbors, bays, mouths of rivers, and adjacent parts of the sea enclosed by headlands belonging to the same state. Within these limits, its rights of property and territorial jurisdiction are absolute, and exclude those of every other state. The general usage of nations superadds to this extent of maritime territory an exclusive territorial jurisdiction over the sea for the distance of one marine league, or the range of a cannon-shot, along all the shores or coasts of the state. The maxim of law on this subject, is, *terrae dominium finitur ubi finitur armorum vis*, which is usually recognized to be about three miles from the shore. And, even beyond this limit, states may exercise a qualified jurisdiction for fiscal and defensive purposes, that is, for the execution of their revenue laws, and to prevent "hovering on their coasts." It is necessary to distinguish between *maritime territory* and *territorial jurisdiction*, which latter will be discussed in another chapter. (*Wheaton, Elem. Int. Law*, pt. 2, ch. 4, § 6; *Grotius, De Jur. Bel. ac Pac.*, lib. 2, cap. 3, § 10; *Bynkershoek, Quest. Jur. Pub.*, lib. 1, cap. 8; *Bynkershoek, De Dominio Maris*, cap. 2; *Polson, Law of Nations*, sec. 5; *Vattel, Droit des Gens*, liv. 1, ch. 23, § 289; *Valin, Com. sur l'Ord.*, liv. 5, tit. 1; *Azuni, Droit Maritime*, tome 1, ch. 2, art. 3; *Garden, De la Dip.*, tome 1, p. 399; *Hautefeuille, Droit des Nations Neut.*, tit. 1, ch. 3, sec. 1; *Ortolan, Diplomatie de la Mer*, liv. 2, ch. 8; *Galiani, dei Doveri, dei P. N.*, liv. 1; *Emerigon, Des Assurances*, ch. 12, § 19; *Abreu, Sobre Presas*, pt. 1, ch. 5, §§ 13, 16; *De Cussy, Droit Maritime*, liv. 1, tit. 2, § 40; *Wildman, Int. Law*, vol. 1, p. 70; *Martens, Precis du Droit des Gens*, § 41; *Pistoye et Duverdy, Traité des Prises*, tit. 2, ch. 1, sec. 1; *Heffter, Droit International*, §§ 65, et seq.; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 3; *Loccenius, De Jure Maritimo*, lib. 1, cap. 4, § 6.)

§ 14. The term "coasts" does not properly comprehend all the *shoals* which form sunken continuations of the land perpetually covered with water, but it includes all the natural appendages of the territory which rise out of the water,

although they may not be of sufficient firmness for habitation or use. No matter whether such appendages are composed of mud or of solid rock, they are considered as a part of the territory of the main land, the right of dominion not depending upon the texture of the soil. This question was directly decided in a case which had reference to a little mud island at the mouth of the Mississippi river, composed of earth and trees drifted down by the river, and not of sufficient consistency to support the purposes of life. (*Wheaton, Elem. Int. Law*, pt. 2, ch. 4, § 7; *The Anna*, 5 *Rob. Rep.*, p. 385; *Wildman, Int. Law*, vol. 1, pp. 39, 40; *Ortolan, Domaine International*, § 93; *Pistoye et Duverdy, Traité des Prises*, tit. 2, ch. 1, sec. 1.)

§ 15. Another case, involving the international right of domain and property, is that of islands in the sea, which do not derive their elements, on the principle of alluvium and increment, immediately from the main shore, but are separated from it by deep channels of a greater or less width. Such islands, if in the vicinity of the main land, are regarded as its dependencies, unless some one else has acquired title to them by virtue of discovery, colonization, purchase, conquest, or some other recognized mode of territorial acquisition. The ownership and occupation of the main land includes the adjacent islands, even though no positive acts of ownership may have been exercised over them. In such a case, the attempt of another power, without title, to colonize them, would be a just cause of complaint, and, if persisted in, of war. But if such islands be in the sea, distant from the main land, their ownership follows the general rule of discovery, occupancy, colonization, purchase and conquest.

By the act of congress, approved August 18th, 1856, when any citizen of the United States discovers a deposit of guano on any island, rock or key, not within the lawful jurisdiction of any other government, and not occupied by the citizens of any other government, and shall take peaceable possession thereof, and occupy the same, such island, rock, or key may, at the discretion of the President of the United States, be considered as appertaining to the United States, and the land and naval forces may be employed by the President to protect the rights of such discoverers, or their assigns.

Nevertheless, such islands, rocks, or keys, are not made a part of the union of the United States, and all acts done, and offenses or crimes committed thereon, or in the waters adjacent thereto, are to be held and deemed to have been done or committed on the high seas, on board a ship or vessel belonging to the United States, and be punished according to the laws of the United States relating to such ships or vessels, and offenses committed on the high seas. (*U. S. Statutes at Large*, vol. 11, p. 119; *Brighley, Digest of the Laws of the U. S.*, p. 301; *Wheaton, Elem. Int. Law*, pt. 2, ch. 4, § 7; *Ortolan, Diplomatie de la Mer*, liv. 2, ch. 8; *Riquelme, Drecho Pub. Int.*, lib. 1, tit. 1, cap. 2; *Wildman, Int. Law*, vol. 1, p. 70; *Grotius, de Jur. Bel. ac Pac.*, lib. 2, cap. 2, § 4; *Puffendorf, de Jure Nat. et Gent.*, lib. 4, cap. 6, § 4; *Vattel, Droit des Gens*, liv. 1, ch. 18, §§ 207-209, 295; *Ortolan, Domaine International*, § 93.)

§ 16. The exclusive right of domain, and territorial jurisdiction, of the British crown, have immemorially extended to the bays or portions of the sea cut off by lines drawn from one promontory to another, along the coasts of the island of Great Britain. They are commonly called the *king's chambers*. A similar jurisdiction, or right of domain, is also asserted by the United States over the Delaware Bay, and other bays and estuaries, as forming portions of their territory. Other nations have claimed a right of territory over bays, gulfs, straits, mouths of rivers, and estuaries which are enclosed by capes and headlands along their respective coasts, and the principle would seem to be pretty well established as a rule of international law. (*Bello, Derecho Internacional*, pt. 1, cap. 2, § 4; *Wheaton, Elem. Int. Law*, pt. 2, ch. 4, § 7; *Sir L. Jenkins, Life and Works*, vol. 2, pp. 727-8, 780; *Vattel, Droit des Gens*, liv. 1, ch. 22, § 281; *Le Louis*, 2 *Dodson Rep.* p. 245; *Church v. Hubbard*, 2 *Cranch Rep.*, p. 187; *Case of the Washington*, *Com. between the U. S. and G. B.*, pp. 170-186; *Emerigon, Des Assurances*, ch. 12, sec. 19; *Valin, Traité des Prises*, ch. 4, sec. 3; *Ortolan, Diplomatie de la Mer*, liv. 2, ch. 8; *Martens, Precis du droit des Gens*, § 42; *Hautefeuille, Des Nations Neutres*, pt. 1, ch. 3, sec. 1; *Heffter, Droit International*, § 76; *De Cussy, Droit Maritime*, liv. 1, tit. 2, § 41.)

§ 17. The principle of this rule is not now contested, but differences have arisen with respect to its limitation, and its application to particular cases, or, in other words, as to what constitutes a bay or estuary, or mouth of a river, and what must be regarded as a portion of the open sea, which is the property or territory of no one, but is common to all nations. By the treaty of 1818, between the United States and Great Britain, the former "renounced forever any liberty heretofore enjoyed, or claimed by the inhabitants thereof, to take, dry, or cure fish on, or within three miles of any of the coasts, bays, creeks, or harbors of his Britanic Majesty's dominions in America," etc. From 1549 to 1852, serious difficulties occurred between the inhabitants of the two countries with respect to the construction of this treaty; the one contending that the *three miles* were to be measured from a line uniting the extreme headlands of the coasts of Nova Scotia, while the other party objected to this, on the ground that the line so drawn cut off large portions of the open sea, or broad estuaries, which were the common property of all; and that such line must be drawn from one headland to the next adjacent, so as not to include these broad bays, or slight indentations, which were properly portions of the open sea. Serious collisions were at one time apprehended between the men-of-war sent by the two governments to protect their respective fisheries. A mutual forbearance, however, prevented a resort to force, and a negotiation was set on foot, which, in 1854, resulted in a joint commission of the two nations, to designate the mouths of rivers, etc., to which the common right of fishery on the coasts of the United States and of the British Provinces was not to extend. (*Cong. Docs. 32d Con. 1st Sess. Senate Ex. Doc. No. 100, Spe. Sess. No. 3; President's Message, Cong. Doc., 1855-6; U. S. Statutes at Large, vol. 10, p. 1089; Annales Marit. et Colo., 1839, part 1, p. 861; Wheaton, Elem. Int. Law, pt. 2, ch. 4, § 8; De Cussy, Droit Maritime, liv. 1, tit. 2, § 41.*)

§ 18. But, besides this claim of maritime territory over the mouths of rivers, bays and estuaries along the coast, different nations have at different times asserted a right of property to certain narrow seas and straits adjacent to their shores, and outside of any lines joining one cape or promontory with

another. Such, for example, as the sovereignty formerly claimed by the Republic of Venice over the Adriatic; the supremacy claimed by England over the narrow seas; and the supremacy asserted by the king of Denmark over the sound and the two belts which form the outlet of the Baltic Sea into the ocean. Such claims have generally been placed on the ground of immemorial use, or prescription. The honors and duties demanded by the state asserting such maritime supremacy, have been paid or refused by other nations, according to circumstances, but the claim itself has never been sanctioned by general acquiescence. (*Wheaton, Elem. Int. Law*, pt. 2, ch. 4, § 9; *Vattel, Droit des Gens*, liv. 1, ch. 23, § 289; *Martens, Precis des Droit des Gens*, § 42; *Klüber, Droit des Gens Mod.*, § 132; *Selden, Mare Clausum*, passim; *Stymann, De Jure Maritimo*, lib. 1, cap. 4, p. 179, et seq.; *Gunther, Europ. Volkerrecht*, t. 2, p. 46; *Rayneval, Inst. du Droit Nat.*, liv. 2, ch. 10; *Pistoye et Duverdey, Traité des Prises*, tit. 2, ch. 1, sec. 1; *Bowyer, Universal Public Law*, ch. 28; *Heffler, Droit International*, § 75; *Hautefeuille, Des Nations Neutres*, pt. 1, ch. 3, sec. 2; *De Cussy, Droit Maritime*, liv. 1, tit. 2, §§ 41, 55.)

§ 19. The claim of Denmark, to impose what are called *soud dues*, was rested by the Danish publicists and diplomatists, not only upon immemorial prescription, sanctioned by a long succession of treaties with other powers, but upon a kind of vested right, originating in remote antiquity, recognized by the system of public law subsequently subsisting, and ratified by the acquiescence of all maritime nations from time immemorial; and they said the claim was originally founded in equity, and still has equitable considerations in its favor, in virtue of the expenses incurred by Denmark in improving the navigation of the sound for the general benefit of commerce. They admitted "that the general principles of the law of nations would now hardly seem to sanction the imposition of tolls similar to the sound dues, where none before had existed." The United States denied the *right* of Denmark to collect such dues, and "adopted the conclusion that they are under no obligation arising from international law or treaty stipulation, to yield to this claim," while they admitted the "necessity to keep up, at considerable expense,

light-houses, buoys, etc., for the security of this navigation," and that the expenditure made by Denmark, for this purpose, "may constitute an equitable claim upon foreign powers for remuneration to the extent they have participated in this advantage," and that "they would not hesitate to share liberally in compensating Denmark for any fair claim for expenses she may incur in improving and rendering safe the navigation of the sound." "In claiming an exemption of our ships and their cargoes from taxation, by Denmark, at the straits of the Baltic," continues Mr. Marcy, the American secretary of state, the United States "are vindicating a great national principle of extensive and various application. If yielded in one instance, it will be difficult to maintain it in others. If exactions upon our trade at the entrance of the Baltic were acquiesced in by the United States, similar exactions might, on the same principle, be demanded at the Straits of Gibraltar and Messina, at the Dardanelles, and on all great navigable rivers whose upper branches and tributaries are occupied by different independent powers." The dispute was amicably arranged by the convention of February 12th, 1858, the sound and belts being made entirely free to American vessels and their cargoes, the United States paying a fixed sum *en bloc* for light-houses, buoys, etc. (*President's Messages*, Dec. 1854 and 1855; *Marcy, Cor. Dep. of State, on Danish Sound Dues*; *Wildman, Int. Law*, vol. 1, ch. 2; *Webster's Life and Works*, vol. 6, p. 466; *Wheaton, Elem. Int. Law*, pt. 2, ch. 4, § 9; *Cong. Doc, H. of R., 33d Cong., 1st Sess., Ex. Doc., 108*; *Hautefeuille, Des Nations Neutres*, tit. 1, ch. 3; *De Cussy, Droit Maritime*, liv. 1, tit. 2, § 55.)

§ 20. No one would now think of reviving the controversy which once occupied the pens of the ablest European jurists, with respect to the right of any one state to appropriate to its own use, and to the exclusion of others, any part of open sea or main ocean, beyond the immediate vicinity of its own coast; but it has sometimes been attempted to extend the principle of *mare clausum* to inland seas, not entirely enclosed within the territorial limits of a single state. Thus, in the treaties of armed neutrality of 1780 and 1800, and in the treaty of 1794, between Denmark and Sweden, the tranquility of the Baltic Sea was proclaimed and guaranteed; and in the

Russian declaration of war against Great Britain of 1807, the inviolability of that sea, and the reciprocal guaranties of the powers bordering upon it, were stated as aggravations of the British proceedings, in entering the sound and attacking the Danish capital in that year. This attempt, on the part of the Baltic powers, to establish in themselves the exclusive control of the Baltic sea, contrary to the well established principles of international law, greatly weakened the force of their complaints against the proceedings of Great Britain toward Denmark, conduct in utter violation of the rights of a sovereign and independent state, and which will remain, in all time, a stain upon the character of the British government. The law of nations does not permit any number of nations, bordering upon a sea, to combine together to close it against the commerce of the rest of the world. (*Wheaton, Elem. Int. Law*, pt. 2, ch. 4, §§ 9-10; *Grotius, de Jur. Bel. ac Pac.*, lib. 2, cap. 3, §§ 8, 13; *Bynkershoek, de Dominio Maris*, cap. 7; *Puffendorf, de Jure Naturæ et Gen.*, lib. 4, cap. 5, § 7; *Vattel, Droit des Gens*, liv. 1, ch. 23, §§ 279, 286; *Ortolan, Dip. de la Mer*, tome 1, pp. 120-126; *Polson, Law of Nations*, sec. 5; *Wildman, Int. Law*, vol. 1, p. 71; *Pistoye et Duverdy, Traité des Prises*, tit. 2, ch. 1, sec. 2; *Bowyer, Universal Public Law*, chs. 13, 28; *Heffter, Droit International*, § 75; *Bello, Derecho Internacional*, pt. 1, cap. 2, § 4; *Hauteville, Des Nations Neutres*, tit. 1, chs. 3, 4; *De Cussy, Droit Maritime*, liv. 1, tit. 2, § 39.)

§ 21. It is generally admitted that the territory of a state includes the seas, lakes and rivers entirely inclosed within its limits. Thus, so long as the shores of the Black Sea were exclusively possessed by Turkey, that sea might, with propriety, be considered as *mare clausum*; and there seemed no reason to question the right of the Ottoman Porte to exclude other nations from navigating the passage which connects it with the Mediterranean, both shores of this passage being also portions of the Turkish territory. But when Turkey lost a part of her possessions bordering upon this sea, and Russia had formed her commercial establishments on the shores of the Euxine, both that empire and other maritime powers became entitled to participate in the commerce of the Black Sea, and consequently to the free navigation of the

Dardanelles and the Bosphorus. This right was expressly recognized by the treaty of Adrianople in 1829. But the right of free navigation of the Black Sea, and the consequent right of passage through the Dardanelles and the Bosphorus, was not construed to interfere with the right of *territorial jurisdiction* which the Ottoman Porte exercises over these straits. These straits are bounded on both sides by the territory of the Sultan, and are, in most parts, less than six miles wide, consequently, he has a right to exclude all foreign ships of war from entering or passing either the Dardanelles or the Bosphorus. This right has also been recognized in the treaties of 1840, 1841, and 1856, and may be considered as permanently incorporated into the public law of Europe. (*Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 4; *Wheaton, Elem. Int. Law*, pt. 2, ch. 4, § 10; *Vattel, Droit des Gens*, liv. 1, ch. 23, § 287; *Martens, Precis du Droit des Gens*, §§ 39, 156; *Wheaton, Hist. Law of Nations*, pp. 577, 583; *Martens, Nouveau Recueil*, tome 8, p. 143; *Polson, Law of Nations*, sec. 5; *Wildman, Int. Law*, vol. 1, ch. 2; *Phillimore, On Int. Law*, vol. 3, Appen. p. 828; *Heffter, Droit International*, § 76.)

§ 22. The great inland lakes, and their navigable outlets, are considered as subject to the same rule as inland seas: where enclosed within the limits of a single state they are regarded as belonging to the territory of that state; but if different nations occupy their borders, the rule of *mare clausum* cannot be applied to the navigation and use of their waters. No distinction is made between salt water lakes, or inland seas, and fresh water lakes. The right of territorial jurisdiction over the outlets of these inland waters, when narrow, and of excluding foreign ships of war, will be particularly discussed in another chapter. (*Wheaton, Elem. Int. Law*, pt. 2, ch. 4, § 11; *Phillimore, On Int. Law*, vol. 1, § 155; *Polson, Law of Nations*, sec. 5; *Wildman, Int. Law*, vol. 1, pp. 71, 72; *Martens, Precis du Droit des Gens*, §§ 39, 156; *Heffter, Droit International*, § 76; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 4; *Hautefeuille, Des Nations Neutres*, tit. 1, ch. 3.)

§ 23. A river which flows, for its entire length, through the territory of a state, is regarded as forming a part of its dominion, including the bays and estuaries formed by its



junction with the sea. Where the entire upper portion of a navigable river is included within a single state, the part so enclosed is undoubtedly the property of such state. Where a navigable river forms the boundary of coterminous states, the middle of the channel,—the *filum aquae*,—or *thalweg*, is generally taken at the line of their separation, the presumption of law being, that the right of navigation is common to them both. But this presumption may be rebutted or destroyed by actual proof of the exclusive title of one of the riparian proprietors to the entire river. Such title may have been acquired by prior occupancy, purchase, cession, treaty, or any one of the modes by which other public territory may be acquired. But where the river not only separates the coterminous states, but also their territorial jurisdictions, the *thalweg*, or middle channel, forms the line of separation through the bays and estuaries through which the waters of the river flow into the sea. As a general rule, this line runs through the middle of the deepest channel, although it may divide the river and its estuaries into two very unequal parts. But the deeper channel may be less suited, or totally unfit, for the purposes of navigation, in which case, the dividing line would be in the middle of the one which is best suited and ordinarily used for that object. The division of the islands in the river and its bays, would follow the same rule. (*Wheaton, Elem. Int. Law*, pt. 2, ch. 4, § 11; *Vattel, Droit des Gens*, liv. 1, ch. 22, §§ 266, 268, 270; *Martens, Precis du Droit des Gens*, § 39; *Heffler, Droit International*, §§ 66, 77; *Phillimore, On Int. Law*, vol. 1, § 155; *Puffendorf, de Jur. Nat. et Gent.*, lib. 4, cap. 7, § 2; *Gundling, Jus. Nat.*, p. 248; *Wolfius, Jus. Gentium*, §§ 106–109; *Styppmannus, Jus. Marit, etc.*, cap. 5, n. 476–552; *Merlin, Repertoire, voc. alluvium*; *Rayneval, Droit de la Nature*, tome 1, p. 307; *De Cussy, Droit Maritime*, liv. 1, tit 2, § 57.)

§ 24. Where the dividing line of two states is water, as a river or lake, which is subject to changes, important questions may arise respecting the rights of property. Thus, where, by a gradual and insensible movement, the water advances on one side and recedes on the other, or by detrition on one side and deposit on the other, a portion of the soil is gradually transferred, there is evidently a loss to one

state and an increase to the other. So also, where islands are washed away on one side of the channel, and new ones formed on the other, there is a corresponding change of territory. Again, suppose that the river or lake which constitutes the boundary, has suddenly changed its bed, will this change produce a corresponding increase or diminution of territory to the adjacent proprietors? The Roman law determined with great care the effects of changes in the distribution of waters upon the ownership of private lands; and the influence of this law is manifest in the rules adopted by publicists with respect to international property. (*Grotius, De Jur. Bel. ac Pac.*, lib. 2, cap. 3, §§ 16, 17; *Puffendorf, De Jure Nat. et Gent.*, lib. 4, cap. 7, § 11; *Vattel, Droit des Gens.*, liv. 1, ch. 22, §§ 268–277; *Martens, Precis du Droit des Gens.*, § 45; *Klüber, Droit des Gens Mod.*, § 134; *Ortolan, Domaine International.* § 78–84; *Gunther, Europ. Völkerrecht*, t. 2, p. 55; *Rayneval, Inst. du Droit Nat.*, liv. 2, ch. 11; *Bowyer, Universal Public Law*, ch. 28; *Pothier, Œuvres de*, tome 10, pp. 87, 88; *Voet, ad Pandects*, tome 1, pp. 606, 607; *Heineccius, Recitationes*, lib. 2, tit. 1, §§ 356–369; *Las Siete Partidas*, Part. 3, tit. 28, l. 31; *Alvarez, Institutes*, lib. 2, tit. 1, § 6; *Asso, Institutiones*, p. 101; *Gomez, Elementos*, lib. 2, tit. 4, § 3; *Febrero Mexicana*, tomo 1, p. 161; *Sala Mexicana*, tomo 2, p. 62; *Justinian, Inst.*, lib. 2, tit. 1, §§ 20–24; *Heffter, Droit International*, § 77; *De Camps, Manuel des Prop. Riv.*, passim; *Chardon, Droit d'Alluvion*, passim; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 4.)

§ 25. Where the moving of the dividing water is so gradual as to be almost insensible, the changes produced are not considered as acquisitions and losses of property, but the natural consequences of property already existing; because, the thing owned is naturally susceptible of this physical increase or decrease. In such a case, whether the dividing water belongs entirely to one state, or the boundary is the middle or *thalweg*, each party gains or loses accordingly as the increase or decrease is upon its side. The same rule applies to the gradual removal or formation of islands in a river or lake which divides states, or in the sea, within the territorial limits or *ligne de respect* of a state bordering upon the ocean. Moreover, a state has a certain right of preëmp-

tion to islands formed adjacent to its coast, even outside of this line of respect. But the case is very different where the river abandons its ancient bed and forms a new channel, or where a lake leaves its former banks and forms a new lake, or a series of new lakes; the boundaries of the states remain in the abandoned bed of the river, or in the position formerly occupied by the lake. (*Grotius, de Jur. Bel. ac Pac.*, lib. 7, cap. 3, § 17; *Ortolan, Domaine International*, §§ 85,-93; *Heffter, Droit International*, § 69, note; *Gunther, Europ. Völkerrecht*, t. 2, p. 57; *Pestel, Commentarii de Repub. Batava.*, § 268; *Rayneval, Inst. du Droit Nat.*, liv. 2, ch. 11; *Bowyer, Universal Public Law*, ch. 28; *Pothier, Œuvres de*, tome 10, pp. 88, et seq.; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 4; *Bello, Derecho Internacional*, pt. 1, cap. 8; *Pando, Derecho Internacional*, p. 99; *Almeda, Derecho Publico*, tomo 1, p. 199; *Cushing, Opinions U. S. Att'ys. Genl.*, vol. 8, p. 175; *Crittenden, Opinions U. S. Att'ys. Genl.*, vol. 5, pp. 264, 412; *Puffendorf, de Jur. Nat. et Gent.*, lib. 4, cap. 5, § 8; *Wolfius, Jus. Gentium*, §§ 108, 109; *De Camps, Manuel des Prop. Riv.*, passim; *Charodon, Droit d'Alluvion*, passim; *Proudhon et Dumay, Domaine Public*, tome 4, ch. 56, sec. 7.)

§ 26. Where a navigable river, during a part of its course, flows through the territory or forms the boundary of one state, but passes through a third state before it enters the sea, questions of some difficulty have arisen with respect to its dominion and use. It is, however, now generally conceded that the right of navigation, for commercial purposes, is common to all the nations inhabiting the different parts of its banks. But this right of *innocent passage*, being what the text-writers call an *imperfect* right, its exercise is necessarily modified by the safety and convenience of the state which is affected by it, and can only be effectually secured by mutual conventions, regulating the mode of its exercise. In other words, the outlet of the river being entirely within the territorial jurisdiction of one state, that state may establish and enforce all proper and necessary regulations, so that this right of innocent passage shall neither endanger its own safety nor interfere with its own paramount right of legislation and jurisdiction. The Roman law declared navigable rivers to be so far public property, that a free passage over them was open

to everybody, but distinguished between rivers and the sea, the former being classed among *res publicae*, and the latter among *res communes*. (*Justinian, Institutes*, lib. 2, tit. 1, § 1–2; *Phillimore, On Int. Law*, vol. 1, §§ 155–6; *Grotius, de Jur. Bel. ac Pac.*, lib. 2, cap. 2, §§ 12–14; *Vattel, Droit des Gens*, liv. 2, ch. 9, §§ 126–130; ch. 10, §§ 132–134; *Puffendorf, de Jur. Nat. et Gent.*, lib. 3, cap. 3, §§ 3–6; *Polson, Law of Nations*, sec. 5; *Wildman, Int. Law*, vol. 1, p. 76; *Ortolan, Domaine International*, § 44; *Bowyer, Universal Public Law*, ch. 28; *Hefter, Droit International*, § 77; *Riquelmne, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 4; *De Cussy, Droit Maritime*, liv. 1, tit. 2, § 57.)

§ 27. The Roman law also declares the right to use the shores to be an incident to that of the water, and the right to navigate a river carries with it the right to moor vessels to its banks, to lade and unlade cargoes, etc. Publicists have applied this principle of the Roman civil law to the same case between nations, and infer the right to use the adjacent land for the purposes, as means necessary to the attainment of the end, for which the free navigation of the water is permitted. The principal right would seem to draw after it the incidental right of using all the means which are necessary to secure its proper enjoyment. But this incidental right, like the principal right itself, is *imperfect* in its nature, and the mutual convenience of both parties must be consulted in its exercise. (*Wheaton, Elem. Int. Law*, pt. 2, ch. 4, § 13; *Phillimore, On Int. Law*, vol. 1, §§ 157–161; *Grotius, de Jur. Bel. ac Pac.*, lib. 2, cap. 2, § 15; *Puffendorf, de Jur. Naturae et Gent.*, lib. 3, cap. 3, § 8; *Vattel, Droit des Gens*, liv. 2, ch. 9, § 129; *Justinian, Institutes*, lib. 2, tit. 1, §§ 1–5; *Bowyer, Universal Public Law*, ch. 28.)

§ 28. Such right of innocent passage, though an *imperfect* right, and requiring mutual conventions regulating the mode of its exercise, is, nevertheless, a real, subsisting right, founded upon the law of nature, and recognized by the most approved writers on public law. It may also be added, that it has been recognized by the general consent of nations, and must now be regarded as an established principle of international law. (*Wheaton, Elem. Int. Law*, pt. 2, ch. 4, §§ 12–14; *Wildman, Int. Law*, vol. 1, p. 76; *Phillimore, On Int. Law*,

vol. 1, §§ 155–169; *Grotius, de Jur. Bel. ac Pac.*, lib. 2, cap. 3, §§ 7–12; *Puffendorf, de Jur. Nat. et Gent.*, lib. 3, cap. 3, §§ 5, et seq.; *Bowyer, Universal Public Law*, ch. 28; *Heffler, Droit International*, §§ 77–80; *Bello, Derecho Internacional*, pt. 1, cap. 3, § 5; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 4; *De Cussy, Droit Maritime*, liv. 1, tit. 2, § 57.)

§ 29. But those interested in the enjoyment of this principal right, and its incidents, may renounce them entirely, or consent to modify them in such a manner as mutual convenience and policy may dictate. Thus, by the treaty of Westphalia, the navigation of the river Scheldt was closed to the Belgic provinces, in favor of the Dutch; and by the treaties of Vienna, and subsequent conventions, the ripuarian powers, on the banks of the great rivers of Europe, agreed to certain detailed regulations respecting their navigation through the territory of the states in which such rivers débouched into the ocean. But this agreement of the ripuarian states to regulations of police and fixed toll duties on vessels and merchandise passing through the territory of another state, to and from the sea, or even an entire surrender or renouncement of the right, cannot be adduced as an argument against the existence of the right itself. On the contrary, if no such right existed, there would be no necessity for its regulation, and its renouncement would be an act of supererogation. (*Wheaton, Elem. Int Law*, pt. 2, ch. 4, § 15; *Wheaton, Hist. Law of Nations*, pp. 282–4, 552; *Phillimore, On Int. Law*, vol. 1, §§ 157–160; *Polson, Law of Nations*, sec. 5; *Heffler, Droit International*, §§ 77–80.)

§ 30. The navigation of the Rhine has often afforded matters of difficulty and dispute between the states which border on it, or through whose territories it flows. By *Annexe* sixteen to the final act of the congress of Vienna in 1815, the free navigation of this river was confirmed “in its whole course, from the point where it becomes navigable to the sea, ascending and descending.” The interpretation of these stipulations gave rise to a controversy between the kingdom of the Netherlands and other states interested in the navigation of that river, from the fact that the *Rhine*, properly so called, does not empty into the sea, but loses its waters among the sandy downs at Kulwick, the navigation being

carried on through the mouths or arms of the sea called the *Leck*, the *Yssel*, and the *Waal* and *Meuse*. After a long and tedious negotiation, the question was finally settled by the convention of Mayence in 1841, providing for the free navigation and commerce of the riparian states "into the sea," with minute regulations of police, and fixed toll duties on vessels and merchandise paying to and from the sea, and to the ports of the upper riparian states on the Rhine. (*Wheaton, Elem. Int. Law*, pt. 2, ch. 4, §§ 16, 17; *Wheaton, Hist. Int. Law*, pp. 498–501; *Martens, Nouveau Recueil*, tome 9, p. 252; *Phillimore, On Int. Law*, vol. 1, §§ 163–168; *Ortolan, Domaine International*, § 44.)

§ 31. The same principle was extended in 1815, by the congress of Vienna, to the navigation of the *Neckar*, the *Mayn*, the *Moselle*, the *Meuse*, and the *Scheldt*; and similar provisions were made for the free navigation of the *Elbe* in 1821, and, at other periods, for the *Po*, the *Danube*, the *Vistula*, and other rivers of ancient Poland. The treaty of Westphalia, 1648, by which the independence of the United Provinces was acknowledged by Spain, contained a stipulation by which the river Scheldt was to continue shut on the side of the former, who were proprietors of both banks, toward the sea. It was also stipulated, that the inhabitants of the United Provinces should abstain from frequenting the places occupied by Spain in the East Indies. Another motive alleged by the Dutch for this stipulation, closing the navigation of the lower Scheldt, was, that the whole course of the two branches of this river, which passed within the dominions of Holland, was entirely *artificial*; that it owed its existence to the skill and labor of Dutchmen; that its banks had been erected and maintained by them at great expense. The emperor Joseph II., in 1781, attempted to open the navigation of this river, and for this purpose, in 1784, brought forward several antiquated claims against the republic. A compromise was effected by the treaty of Fontainebleau, in 1785, by which it was agreed that the river Scheldt, from Saftingen to the sea, should continue to be shut on the side of the States General, as well as the canals of Sas, Swin, and the other mouths of the sea there terminating, conformably to the treaty of Munster. In return for these conces-

sions, the Dutch accorded several of the emperor's demands, and agreed to pay an indemnity of ten millions of florins. The claim of Holland in this discussion was defended by Mirabeau, on the ground of positive conventional law. He was not absolutely opposed to the free navigation of the Scheldt, but, on the contrary, endeavored to show how it might be opened without danger to Holland and Europe, by the independence of Belgium, which would form a neutral barrier to the United Provinces. The free navigation of this river was again seriously discussed in 1792-3, in the diplomatic correspondence between Holland, Belgium, England and France; and the question finally settled, as before stated, by the congress of Vienna, in 1815, on the basis of the celebrated memoir presented by Baron Wilhelm Von Humboldt. (*Wheaton, Hist. Law of Nations*, pp. 282, 361, 498; *Wheaton, Elem. Int. Law*, pt. 2, ch. 4, §§ 16, 17; *Martens, Nouveau Recueil*, tome 9, p. 361; *Phillimore, On Int. Law*, vol. 1, §§ 164-168; *Martens, Rec. de Traités*, tome 30, p. 209; *Mayer, Corpus Juris. Germ.*, tome 2, pp. 224-239, 298; *Ortolan Domain International*, § 44; *De Cussy, Droit Maritime*, liv. 1, tit 2, § 57.)

§ 32. By the treaty of 1763, between France, Spain, and Great Britain, the boundary between the French and British possessions in North America was the middle of the river Mississippi, from its source to the Iberville, and thence, through that river and lakes Maurepas and Pontchartrain, to the sea. The right of freely navigating the Mississippi, from its source to the sea, was, at the same time, secured to the subjects of Great Britain. Both Louisiana and Florida were afterwards ceded to Spain by France and Great Britain. By the independence of the United States, its citizens had acquired the same rights, with respect to the navigation of the Mississippi, as had belonged to the subjects of Great Britain. But Spain, having become possessed of both banks of that river, from its mouth to a considerable distance above, claimed its exclusive navigation below the southern boundary of the United States. This claim was contested by the United States, as contrary to the treaty of 1763, as well as in violation of the law of nature and of nations. The dispute was terminated by the treaty of San Lorenzo el Real, in 1795,

by which the free navigation of the Mississippi was secured to the citizens of the United States, in its whole breadth, from its source to the ocean. By the subsequent acquisition of Louisiana and Florida by the United States, the whole river, from its source to the Gulf of Mexico, was included within their territory, and, consequently, to them belonged the exclusive right of its navigation. (*Wheaton, Elem. Int. Law*, pt. 2, ch. 4, § 18; *Phillimore, On Int. Law*, vol. 1, § 169; *Wheaton, Hist. Law of Nations*, pp. 506, et seq.; *Waile, State Papers*, vol. 10, pp. 135–140; *De Cussy, Droit Maritime*, liv. 1, tit. 2, § 57; liv. 2, ch. 28.)

§ 33. The relative position of the United States and Great Britain, says Mr. Wheaton, in respect to the navigation of the great northern lakes and the river St. Lawrence, appears to be similar to that of the United States and Spain, previously to the cession of Louisiana and Florida, in respect to the Mississippi; the United States being in possession of the southern shores of the lakes and the river St. Lawrence to the point where their northern boundary strikes that river, and Great Britain of the northern shores of the lakes and of the river to the same point, and of both banks of the river, from the latitude forty-five degrees north to the sea. The United States claimed the right to navigate the St. Lawrence, to and from the sea, as one to which they were entitled by the laws of nations. In addition to the arguments used in support of their right, in 1795, to the free navigation of the Mississippi, when Spain possessed both banks of that river near its mouth, the United States fortified their claim by the consideration that this navigation was before the war of the American revolution, the common property of all the British subjects inhabiting this continent, having been acquired from France by the united exertions of the mother country and the colonies in the war of 1756; and that their claim to the free navigation of the St. Lawrence was precisely the same nature with that of Great Britain to the navigation of the Mississippi, recognized in 1763, when the mouth and lower shores of that river were held by another power.

The arguments of the British government against this claim were by no means satisfactory to the United States,



and do not seem well founded upon the principles of international law. The discussion at the time,—1826,—led to no other result than to present the subject to the more deliberate consideration of the two nations. The question, however, was satisfactorily arranged by the commercial treaty of the 5th of June, 1854, between the two countries, the fourth article of which provides, that the citizens and inhabitants of the United States shall have the right to navigate the river St. Lawrence and the canals of Canada, used as the means of communicating between the great lakes and the Atlantic ocean, with their vessels, boats, and crafts, as fully and freely as the subjects of her Britanic Majesty, subject only to the same tolls and other assessments as now are, or may hereafter, be exacted of her Majesty's said subjects; it being understood, however, that the British government retains the right of suspending this privilege, on giving due notice thereof to the government of the United States. (*De Cussy, Droit Maritime*, liv. 2, ch. 28; *Wheaton, Elem. Int. Law*, pt. 2, ch. 4, § 19; *Wheaton, Hist. Law of Nations*, pp. 511, et seq.; *Phillimore, On International Law*, vol. 1, § 170; *Congress. Docs.*, 1827–1828, No. 43; *Hansard, Parl. Deb.*, vol. 127, No. 6, pp. 1073–4; *U. S. Statutes at Large*, vol. 10, p. 1091.)

## CHAPTER VII.

### RIGHTS OF LEGISLATION AND JURISDICTION.

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§ 1. We have already remarked, that the exclusive power of civil and criminal legislation, is one of the essential rights of every independent and sovereign state. An infringement upon this right is a limitation of the natural sovereignty of the state, and if extended to a general denial of this power,

it is justly considered as depriving the state of one of its most essential attributes, and as reducing it to the position of dependence upon the will of another. In such a case, it can no longer claim to be numbered among independent and sovereign states, for it no longer possesses the attributes necessary to entitle it to rank as such among the nations of the world, viz.: *the right to exercise its volition*, and the capacity to contract obligations. (*Vide Ante*, chapter iii., § 1, and chapter iv., § 14; *Vattel, Droit des Gens*, liv. 1, ch. 1, § 4; *Wheaton, Elem. Int. Law*, pt. 2, ch. 2, § 1; *Riquelme, Derecho, Pub. Int.*, lib. 2, tit. 1, cap. 1; *Polson, Law of Nations*, sec. 5; *Garden, De Diplomatie*, tome 1, pt. 3, § 7; *Merlin, Repertoire, verb. Souveraineté*; *Dalloz, Repertoire verb. Souveraineté*.)

§ 2. This sovereign right of legislation extends, (with the exceptions hereafter to be mentioned,) to the regulation of all real or immoveable property within the territorial limits of the state, no matter by what title such property may be held, or whether it belongs to aliens or to citizens of the state. The law of the place, where real or immovable property is situate, or the *lex loci rei sitae*, governs in everything relating to the tenure, title, and transfer of such property. Hence it is, that the descent, device, or conveyance of real property, in a foreign country, must be governed by, and executed according to, the local laws of the state where such property is situate. And where these local laws prescribe, as to instruments for the transfer of real property, particular forms which can only be observed in the place where it is situated, such as the registry of a deed, or the probate of a will, the transfer cannot be executed in a foreign country. But, by the rules of international jurisprudence, recognized among the different nations of the European continent, if the property is allowed, by the *lex loci rei sitae*, to be alienated by deed or will, and the local laws do not require forms which must necessarily be observed in the place where it is situated, the deed or will may be executed according to the law of the place where it is made. But the application of the rule is less liberal in the United States and Great Britain; the formalities required by the laws of the state where the land lies being essential to the validity of the transfer. (*Wheaton, Elem. Int. Law*, pt. 2, ch. 2, § 3; *Huberus, Prælect.*,

lib. 1, tit. 3, § 15; *Foelix, Droit Int. Privé*, § 52; *Story, Conflict of Laws*, §§ 364–373, 428–483; *Robinson v. Campbell*, 3 *Wheaton Rep.*, p. 217; *United States v. Crosby*, 7 *Cranch Rep.*, p. 115; *Massé, Droit Commercial*, tome 2, §§ 65, et seq.; *Bowyer, Universal Public Law*, ch. 16; *Westlake, Private Int. Law*, ch. 4; *Coppin v. Coppin*, 2 *P. W. Rep.*, p. 291; *Brodie v. Barry*, 2 *Ves. and Be. Rep.*, p. 127; *Dundas v. Dundas*, 2 *Dow. and Cl. Rep.*, p. 349; *Johnson v. Tilford*, 1 *Russ. and My. Rep.*, p. 244.)

§ 3. With respect to personal or movable property, the same rule generally prevails, except that the law of the place where the person to whom it belonged was domiciled at the time of his decease, governs the succession, *ab intestato*, to his personal effects. So, also, the law of the place where any instrument relating to personal property is executed, by a person domiciled in that place, governs, as to the form, execution and interpretation of the instrument. Thus, the validity, effect and interpretation of a testament of personal property, must be determined by the law of the place where it is made, and where the party making it is domiciled. *Lex loci domicilii regit actum*. The rule is applicable to every transfer, alienation, or disposition made by the owner, whether it be *inter vivos*, or *causa mortis*, and is founded on the maxim that personal property has no locality, but adheres to the person of its owner. *Mobilia sequuntur personam*. There are exceptions to this rule; *first*, in cases where the local or customary law of the place gives to the particular property a necessarily implied locality; and *second*, in special cases provided for by local statutes. Thus, by the laws of some countries, certain movables are considered as annexed to immovables, either by incorporation, or as incidents, and therefore partake of the character of the latter, such as fixtures of personal property in houses, under the English common law. Heritable bonds, ground rents, and other rents on land, are ranked, by the Scottish law, among the class of immovables. Contracts respecting public funds, or stocks, may be required to be carried into execution, according to the local law; and the same rule may properly apply to the transfer of shares in bank, insurance, canal, railroad, and other companies which owe their existence to, and are regulated by, peculiar local laws. Subject to these, and perhaps some other excep-

tions, the general rule is, that a transfer of personal property, good by the law of the owner's domicil, is valid wherever it may be situate. (*Wheaton, Elem. Int. Law*, pt. 2, ch. 2, § 5; *Story, Conflict of Laws*, §§ 374-423; *Huberus, Prælect.*, lib. 1, tit. 3, §§ 14, 15; *Foelix, Droit Int. Privé*, § 37; *Bynkershoek, Quaest. Jur. Pub.*, lib. 1, cap. 16; *Henry, Foreign Law*. App. p. 196; *Merlin, Répertoire, verb. Loi.*, § 6, No. 3; *Massé, Droit Commercial*, tome 2, §§ 66, et seq.; *Bowyer, Universal Public Law*, ch. 16; *U. S. v. Bank of U. S.*, 8 *Rob. Rep.*, p. 262; *Black v. Zacharie*, 3 *Howard Rep.*, p. 483; *Westlake, Private Int. Law*, ch. 8; *Sill v. Worswick*, 1 *H. Bl. Rep.*, p. 690; *Riquelme, Derecho Pub. Int.*, lib. 2, tit. 1, caps. 1-5; *Gardner, Institutes*, p. 122, et seq.)

§ 4. The general law of contracts is, that the validity of every contract is to be decided by the law of the place where it is made, or, in legal phraseology, the *lex loci contractus* is to govern in everything respecting the form, interpretation, obligation, and effect of the contract. "The rule," says Story, "is founded, not merely in the convenience, but in the necessities of nations; for, otherwise, it would be impracticable for them to carry on an extensive intercourse with each other. The whole system of agencies, purchases and sales, credits, and negotiable instrumens, rests on this foundation; and the nation, which should refuse to acknowledge the common principles, would soon find its whole commercial intercourse reduced to a state like that in which it now exists with savage tribes." "In this, as a general principle, there seems a universal consent of courts and jurists, foreign and domestic. The same rule applies, *vice versâ*, to the invalidity of contracts; if void or illegal by the law of the place of the contract, they are generally held void and illegal everywhere."

We have already mentioned exceptions to this rule, in the transfer of real property, which is governed by the *lex loci rei sitæ*, and in the transfer of immovable property, which, though generally governed by the *lex domicilii*, is, in some cases, subject to the same rule as real property. The *lex loci contractus* cannot apply to the personal *status* and capacity of the citizens of a state, or to cases where it would conflict with the laws of another state in respect to its police, its

health, its commerce, its revenue, and generally its sovereign authority, and the rights and interests of its citizens. These exceptions, says Story, “result from the consideration that the authority of the acts and contracts done in other states, are not *propria vigore*, of any efficacy beyond the territories of that state, and whatever is attributed to them elsewhere, is from comity and not of strict right; and every independent community will, and ought to judge for itself, how far that comity ought to extend. The reasonable limitation is, that it shall not suffer prejudice by its comity. Mr. Justice Best has, with great force, said, that, in cases turning upon the comity of nations, (*comitas inter communitates*,) it is a maxim, that the comity cannot prevail in cases where it violates the law of our own country, the law of nature, or the law of God. Contracts, therefore, which are in evasion or fraud, of the laws of a country, or the rights or duties of its subjects, contracts against good morals, or religion, or public rights, and contracts opposed to the national policy or institutions, are deemed nullities in every country affected by such considerations, although they may be valid by the laws of the place where they are made.” (*Kent, Com. on Am. Law*, vol. 2, pp. 454, 455; *Wheaton, Elem. Int. Law*, pt. 2, ch. 2, § 7; *Story, Conflict of Laws*, §§ 242–244; *Huberus, Prælect.*, lib. 1, tit. 3, §§ 3, 5; *Justinian*, 1 *Institute*, lib. 1, tit. 2, § 2; *Bouhier, Les Coutumes, etc.*, ch. 21, § 190; *Forbes v. Cochrane*, 2 *B. and Cres. Rep.*, pp. 448–471; *Massé, Droit Commercial*, tome 2, §§ 77, et seq.; *Bowyer, Universal Public Law*, ch. 16; *Westlake, Private Int. Law*, ch. 7; *Riquelme, Derecho Pub. Int.*, lib. 2, tit. 1, cap. 4; *Gardner, Institutes*, pp. 122, et seq.)

§ 5. But, with regard to these exceptions to the rule of international comity as applicable to contracts of personal property, it must be remembered that the rule is based, not on the conformity, but on the repugnancy of the laws of different states. When, therefore, it is said, that contracts opposed to the national policy and institutions of a state, or to good morals, are excepted from the general rule of comity, it is not meant that all contracts unauthorized by, or opposed to the *laws* of a state, are thus excepted. Comity is the general rule, and the exceptions are strictly limited so as not to affect

the principle which is recognized and established by the rule. Thus, it is held in Massachusetts, that a contract for the sale and delivery of slaves in a foreign state where such sale is not prohibited, may be sued in another state where slaves cannot be imported. But if the delivery was to be in a state where the importation was interdicted, the contract could not be sued on in the interdicting state, "because the giving of legal effect to such a contract would be repugnant to its rights and interests." So of contracts opposed to good morals, "Marriages not naturally unlawful, but prohibited by the law of one state, and not of another, if celebrated where they are not prohibited, would be holden valid in a state where they are not allowed. As in this state, a marriage between a man and his deceased wife's sister is lawful, but it is not in some states. Such a marriage celebrated here, would be held valid in any other state, and the parties entitled to the benefits of the matrimonial contract." But, "if a foreign state allows of marriages incestuous by the law of nature, as between parent and child, such marriage could not be allowed to have any validity here." "In an action on a contract made in a foreign state by a prostitute, to recover the wages of her prostitution: this contract, if lawful where it was made, could not be the legal ground of an action here; for the consideration is confessedly immoral, and a judgment in support of it would be pernicious from its example. And, perhaps, all cases may be considered as within this exception, which are founded on moral turpitude, in respect either of the consideration or the stipulation." It is thus seen that these exceptions, with respect to national policy and good morals, must, in the first case, be limited to contracts, the execution of which would be repugnant to its interests and rights of sovereignty; and, in the second case, those which are founded on moral turpitude, in respect either of the consideration or the stipulation. So, when it is said that the rule of comity does not apply to contracts made in evasion or fraud of the laws of a country, or of the rights and duties of its subjects, it is not meant that all contracts made in conformity with laws of the place of the contract, but which would have been void if made in the place of the forum as being prohibited by its laws, are excepted from

that rule. Thus, in *certain cases*, where the law of a state prohibits particular kinds of voluntary assignments for the benefit of creditors, it has been held that those made in foreign states, and which come within the prohibition, although valid by the law of the place where made, will not be sustained in the forum of the state so prohibiting them. But the exception in those cases is not made on the ground of repugnancy in the laws of the two places, for that would, as has already been shown, make the exception the general rule, and destroy the very foundation of the law of international comity. The exception, with respect to personal property, when made, has been based on the fact that the foreign assignment was injurious to the rights and interests of citizens of the *prohibiting state*, and it has been limited to *property within its jurisdiction*, at the time of the assignment, and held by the law as *pledged* for the payment of debts due *within* the state. (*Westlake, Private Int. Law*, ch. 6; *Story, Conflict of Laws*, §§245, 248; *Burrill, On Assignments*, p. 336; *Greenwood v. Curtis*, 6 *Mass. Rep.*, p. 378; *Zipcey v. Thompson*, 1 *Gray Rep.*, p. 243; *Ingraham v. Geyer*, 13 *Mass. Rep.*, p. 147; *Varnum v. Camp*, 1 *Green Rep.*, p. 326; *Thuret v. Jenkins*, 7 *Martin Rep.*, p. 353; *Richardson v. Leavitt*, 1 *Lou. Ann.*, p. 430; *Whitemwright v. Leavitt*, 4 *Lou. Ann.*, p. 352; *U. S. v. Bank of U. S.*, 8 *Rob. Rep.*, p. 262; *Black v. Zacharie*, 3 *Haw. Rep.*, p. 483; *Forbes v. Scannel*, 13 *Cal. Rep.*, p. 242.)

§ 6 But while the law of the place where the contract is made must determine the obligation of the contract, the law of the place where the suit is pending must regulate the remedy, or manner of proceeding, to enforce the obligation. Thus, if a contract made in one country is attempted to be enforced, or comes incidentally in question, in the judicial tribunals of another, everything relating to the forms of proceeding, and the rules of evidence, to limitation or prescription, and to the execution of judgments, is to be determined solely and exclusively by the law of the state where the proceeding is pending. In general terms, it may be stated that the obligations of a contract are to be determined by the *lex domicilii* or *lex loci contractus*, and the proceeding or remedy for enforcing it by the *lex fori*. "The reasons for this doctrine," says Justice Story, "are so obvious, that they scarcely require any illus-



tration. The business of the administration of justice by any nation is, in a peculiar and emphatic sense, a part of its public right and duty. Each nation is at liberty to adopt such a course of proceeding as best comports with its convenience and interests, and the interests of its own subjects, for whom its laws are particularly designed. The different kinds of remedies, and the modes of proceeding best adapted to enforce rights and guard against wrongs, must materially depend upon the structure of its own jurisprudence. What would be well adapted to the jurisprudence, customary and positive, of one nation, for rights which it recognized, or for duties which it enforced, might be wholly unfit for that of another nation, either as having gross defects, or steering wide of the appropriate remedial justice." \* \* \* "All that a nation can, therefore, be justly required to do, is to open its own tribunals to foreigners, in the same manner and to the same extent, as they are open to its own subjects, and to give them the redress, as to rights and wrongs, which it deems fit to acknowledge in its own municipal code for natives and residents." (*Story, Conflict of Laws*, §§ 556, 557; *Boullenois, Traité des Lois, etc.*, tome 2, p. 462; *Kent, Com. on Am. Law*, vol. 2, p. 118; *Robinson v. Bland*, 2 *Burr. Rep.*, p. 1084; *Fenwick v. Sears*, 1 *Cranch Rep.*, p. 259; *Massé, Droit Commercial*, tome 2, §§ 220, et seq.; *Riquelme, Derecho Pub. Int.*, lib. 2, tit. 1, caps. 1-5; *Westlake, Private Int. Law*, ch. 14.)

§ 7. The right of municipal legislation of a sovereign state extends to everything affecting the state and capacity of its own subjects, with respect to their personal rights within its own territory, and also, with certain exceptions, to the regulation of the conduct of all persons within its jurisdiction, whether subjects or foreigners. Moreover, these municipal laws, in some cases, operate beyond its territorial jurisdiction, with respect to the condition and personal capacity of its citizens, when resident in a foreign country; such as the qualities of citizenship, legitimacy and illegitimacy, minority and majority, idiocy, lunacy, marriage and divorce. The laws of a state, with respect to these qualities or capacities of its subjects, travel with them wherever they go, and attach to them in whatever country they are resident. But it must be observed that the municipal laws of one state cannot interfere

with any rights its subjects may acquire, or privileges they may enjoy, under the laws of another state, while they are resident in such foreign state, and without the jurisdiction of their own country. The same rule applies to personal duties and obligations. A citizen of one country, naturalized or domiciled in another state, enjoys the rights and privileges given him by the state where he is so naturalized or domiciled. The laws of his native country cannot affect him personally, so long as he is without its jurisdiction. But if he return to his native country, and place himself within its jurisdiction, it has usually been held that he becomes not only subject to its laws generally, but also to the duties and obligations of his primitive allegiance. But this question will be more particularly considered in the chapter on national character. (*Wheaton, Elem. Int. Law*, pt. 2, ch. 2, § 2, note; *Martens, Precis du Droit des Gens*, §§ 92, et seq.; *Massé, Droit Commercial*, tome 2, §§ 55, et seq.; *Bello, Derecho Internacional*, pt. 1, cap. 4, §§ 3–5; *Heffter, Droit International*, §§ 58–63; *Westlake, Private International Law*, ch. 13; *Foelix, Droit Int. Privé*, § 454.)

§ 8. In the darkness of the middle ages, the rule called *jus albinatus*, or *droit d'aubaine*, was established, by which all the property of a deceased foreigner, whether movable or immovable, was confiscated to the use of the state, to the exclusion of his heirs, whether claiming *ab intestato*, or under a will of the deceased. But the progress of civilization has almost entirely abolished this barbarous and inhospitable usage. Judge Story expresses a doubt if it is now recognized by any of the civilized nations of the earth. The analagous usage of the *jus detractus* or *droit de retraction*, by which a tax was levied upon the removal from one state to another of property acquired by succession or device, has also been reciprocally abolished in most civilized countries. (*Wheaton, Elem. Int. Law*, pt. 2, ch. 2, § 4; *Klüber, Droit des Gens*, pt. 2, tit. 1, ch. 2, §§ 32, 33; *Mayer, Corp. Jur. Germ.*, tome 2, p. 17; *Merlin, verb. Aubaine*; *Martens, Precis du Droit des Gens*, § 90; *Massé, Droit Commercial*, tome 2, §§ 8–14; *Bacquet, Droit d'Aubaine*, chs. 2, et seq.; *Cushing, Opinions of U. S. Atty's Genl.*, vol. 8, p. 411.)

§ 9. The rules of international and municipal law, with respect to foreigners holding real estate, are less liberal and just than with respect to their personal property. It seems to be the universal rule of civilized society, that when the owner of property dies intestate and leaves no heirs, it should vest in the public, and be at the disposal of the government. Where, therefore, the deceased leaves no heirs capable of succeeding to his estate, it vests in the state. According to the English law, *escheat* denotes an obstruction of the course of descent, and a consequent determination of the tenure, by some unforeseen contingency, in which case the land naturally results back, by a kind of reversion, to the original grantor, or lord of the fee. But where there are no feudal tenures, and no private person to succeed to the inheritance by escheat, the state steps in, in the place of the feudal lord, by virtue of its sovereignty, as the presumed original proprietor of all the lands within its jurisdiction. The principle is certainly a just one, that, if the ownership of property becomes vacant, the right should subside into the whole community, in whom it was supposed to be originally vested, when society first assumed the elements of order and subordination. But the rules of English law, with respect to the rights of alien heirs to inherit property, are so unjust and illiberal in their nature and effects, that they have been modified and limited in most of the states of the American Union, by decisions of courts and statutory dispositions. The American Union, as such, has no law of succession, of inheritance, of descent, of filiation, or of tenure of land, whether in the case of citizens of the United States or of foreigners. Relationship, inheritance, testaments, successions, tenure of estates, real and personal, all these are questions of the local law of the individual states. But in their treaties with foreign countries, the United States have stipulated against the application of the right of escheat, or the *droit d'aubaine*, to aliens claiming real estate by descent in the United States, and that the descent should be the same as if such foreigner were not disqualified by alienage. Such treaties are in accordance with the more liberal spirit of the age, and with the present condition of public law in Europe. But it has been contended by some,

that the federal government has no power, under the constitution, to abrogate by treaty an incompatible law of either of the states, and that the state laws must control, in such matters, notwithstanding the provisions of treaties. But the weight of authority is opposed to this view, and the courts have generally held that such stipulations of treaties are within the constitutional powers of the Union. (*Bouvier, Law Dictionary, verb. Escheat; Kent, Com. on Am. Law.*, vol. 4, p. 420; *Blackstone, Commentaries*, vol 2, p. 244; *Cushing, Opinions U. S. Attorney General*, vol. 8, p. 411; *Merlin, Repertoire, verb. Aubaine; Fairfax's Lessee v. Hunter's Lessee*, 7 *Cranch Rep.*, p. 627; *Ware v. Hilton*, 3 *Dallas Rep.*, p. 242; *Chirac v. Chirac*, 2 *Wheat. Rep.*, p. 259; *Orr v. Hodgson*, 4 *Wheat. Rep.*, p. 453; *The Society, etc. v. New Haven*, 8 *Wheat. Rep.*, p. 464; *Hughes v. Edwards*, 9 *Wheat. Rep.*, p. 489; *Banks v. Carneal*, 10 *Wheat. Rep.*, p 181; *Henks v. Dupont*, 3 *Peters Rep.*, p. 242; *The People v. Gerke*, 5 *Cal. Rep.*, p, 381; *U. S. Statutes at Large*, Art. 11, *Treaty with France*, 1778, vol. 8, p. 18; *Id.*, Art. 7, *Convention with France*, 1800, vol. 8, p. 182; *Id.*, Art. 6, *Treaty with Netherlands*, 1782, vol. 8, p. 36; *Id.*, Art. 14, *Treaty with Prussia*, 1828, vol. 8, 382; *Jefferson, Works of*, vol 3, p. 365.)

§ 10. By the laws of some countries, marriage is considered in no other light than as a civil contract, while in others, it becomes a religious as well a natural or civil contract; "for it is a great mistake," says Story, "to suppose that because it is the one, therefore it may not likewise be the other." Marriage is a personal consensual contract, but is a contract *sui generis*, and differs from other contracts in this, that the rights and obligations, or duties arising from it, are not left entirely to be regulated by the agreement of parties, but are, to a certain extent, matters of municipal regulation, over which the parties have no control by any declaration of their will; and, unlike other contracts, it cannot, in general, be dissolved by mutual consent. It is, therefore, evident that the rules of law applicable to other contracts, cannot always be resorted to in expounding and enforcing the marriage contract. It may, however, be laid down as a general principle, that so far as marriage is a consensual personal contract, its validity must be determined according to the *lex loci*; if

valid in the place where it is celebrated, it is valid everywhere, and if invalid there, it is equally invalid everywhere. But there are certain exceptions to this rule, the most prominent of which are, those of polygamy and incest, (which are prohibited by the laws of every civilized country,) and to these some writers add those marriages made by a fraudulent evasion of the laws of the state to which the parties belong. With respect to the rights, duties, and obligations arising from the marriage relation, we must, in many cases, look to the law of the domicile. It is, therefore, obvious that the rules of international jurisprudence, with respect to this contract, are somewhat variable, according to the peculiar circumstances of each case. Moreover, on some questions arising out of this relation, no rule can be said to be yet established, there being a direct conflict in the judicial decisions of different states, and in the opinions of the most eminent of text-writers. After a full survey of the writings and cases, foreign and domestic, on this subject, Story lays down the following general rules, as the result of his examination; 1st, Where there is a marriage in a foreign country, and an express nuptial contract, with respect to personal property, it will be sustained everywhere, unless it contravenes some positive rule of law or policy; but, as to real property, it will be made subservient to the *lex rei sitae*; 2d, Where such a contract applies to personal property, and there is afterward a change of matrimonial domicile, the law of actual domicile will govern as to future acquisitions; 3d, If there be no such nuptial contract, the matrimonial domicile governs all the personal property everywhere, but not the real property; 4th, The matrimonial domicile governs to all acquisitions, présent and future, if there be no change of domicile. If there be, then the law of the actual domicile will govern as to future acquisitions, and the law *rei sitae*, as to real property. (*Story, Conflict of Laws*, §§ 108–199; *Kent, Com. on Am. Law*, vol. 2, p. 63; *Wheaton, Elem. Int. Law*, pt. 2, ch. 2, § 7; *Huberus, Praelect.*, lib. 1, tit. 3, § 8; *Massé, Droit Commercial*, tome 2, §§ 63, 332, et seq.; *Bowyer, Universal Public Law*, ch. 16; *Westlake, Private Int. Law*, ch. 11.)

§ 11. The same remarks will apply to international jurisprudence on the subject of divorce, or the dissolution of the

matrimonial state, and a release of the contracting parties from all future obligation. "It is deemed by all modern nations to be within the competency of legislation," says Story, "to provide for such a dissolution and release, in some form, and for some cause. And there is no doubt that a divorce, regularly obtained, according to the jurisprudence of the country where the marriage was celebrated, and where the parties are domiciled, will be held a complete dissolution of the matrimonial contract in every other country. I say, where the marriage is celebrated, and where the parties are domiciled, for both ingredients are, or may be, material, and the presence of one, and the absence of the other, may change the legal predicament of the case. The real difficulty is, to lay down appropriate principles to govern cases where the marriage is celebrated in one case, and the parties are domiciled in another; where there is a change of domicile by one party, without a similar change by the other; where, by the law of the place of celebration, the marriage is indissoluble, or dissoluble only under peculiar circumstances, and by the law of another, it is dissoluble for various causes, and even at the pleasure of the parties." On this subject, there is some conflict of authorities, but it is not our intention to examine these discussions. (*Story, Conflict of Laws*, §§ 200–230; *Kent, Com. on Am. Law*, vol. 2, p. 62; *Ferguson, On Marriage and Divorce*, vol. 1, § 18; *Erskine, Institutes*, b. 1, tit. 6, §§ 38, 43; *Wheaton, Elem. Int. Law*, pt. 2, ch. 2, § 21; *Connelly v. Connelly*, 2 *English Law and Eq. Rep.*, p. 570; *Dorsey v. Dorsey*, 1 *Chandler's Law Reporter*, p. 287; *Bowyer, Universal Public Law*, ch. 16; *Westlake, Private Int. Law*, ch. 11; *Gardner, Institutes*, pp. 201, et seq.)

§ 12. The laws of trade and navigation of a state are binding upon its citizens wherever they may be, but they cannot affect foreigners beyond its territorial limits. Thus, offenses against the laws of a state, regulating or prohibiting any particular trade, if committed by foreigners within the territorial jurisdiction of another state, are not punishable by the tribunals of the state whose laws they have violated; but if committed by its citizens, they are so punishable, no matter where committed, whether within its own limits, on the high seas, or in a foreign country. A distinction, however, must

be made between mere commercial regulations permitting or prohibiting a certain trade, and statutes creating a criminal offense, with personal penalties expressly applicable to all the citizens of the state. The commercial domicile of a party may sometimes exempt him from the operation of the laws of trade of his own country, but whilst his former allegiance continues, he is liable to incur the penalties of a criminal offense against his own country, which penalties may be enforced whenever he comes within the reach of its municipal laws. (*Wheaton, Elem. Int. Law*, pt. 2, ch. 2, § 13; *Foelix, Droit Int. Privé*, §§ 510–532; *American Jurist*, vol. 22, pp. 381–386; *Massé, Droit Commercial*, tome 2, §§ 38, 376, et seq.; *Bello, Derecho Internacional*, pt. 1, cap. 4, §§ 5, 6.)

§ 13 It is laid down, as a general principle of international jurisprudence, that a discharge of a contract by the law of the place where it is made, is a discharge everywhere, no matter whether made between a citizen and a foreigner, or between foreigners. But in the application of this rule, it is necessary to distinguish between cases where, by the *lex loci*, there is a virtual or direct extinguishment of the debt itself, and where there is only a partial extinguishment of the remedy. By the *bankrupt* and insolvent laws of some states, there is an absolute discharge from all rights and remedies of the creditors, while, in other states, these laws fall far short of this extent and operation, neither the obligation nor the remedy being entirely extinguished. So far as the bankrupt code merely forms a part of the remedy for a breach of the contract, it belongs to the *lex fori*, which cannot operate extra-territorially within the jurisdiction of any other state having the exclusive right of regulating the proceedings of its own courts of justice. But where the examination, instead of being merely contingent upon the failure to perform the obligation, through insolvency, enters into and forms an essential ingredient of the original contract itself, by the law of the country where it is made, it cannot be enforced in any other state, by the prohibited means. This has led to various refinements and distinctions in the application of the principles of international jurisprudence to the law of bankruptcy, which it is not our object to discuss. (*Lord Stair's Institutions*, vol. 1, p. 4, note, ed. 1832; *Wheaton, Elem. Int. Law*, pt. 2,

ch. 2, § 6; *Rose, Cases in Bankruptcy*, vol. 1, p. 462; *Kent, Com. on Am. Law*, vol. 2, p. 398; *Harrison v. Sterry*, 5 *Cranch Rep.*, p. 289; *Ogden v. Saunders*, 11 *Wheaton Rep.*, p. 153; *Sturges v. Crowninshield*, 4 *Wheaton Rep.*, p. 122; *McMillan v. McNeil*, 1 *Wheat. Rep.*, p. 209; *Le Roy v. Crowninshield*, 2 *Mason Rep.*, p. 161; *Pugh v. Russell*, 2 *Blackford Rep.*, p. 391; *Van Raugh v. Van Arsdale*, 3 *Caine's Rep.*, p. 154; *Woodhull v. Wagner*, 1 *Baldwin Rep.*, p. 296; *Van Hook v. Whitlock*, 26 *Wendell Rep.*, p. 43; *Phillips v. Allen*, 8 *Barn. and Cres. Rep.*, p. 477; *Lewis v. Owen*, 4 *Barn. and Ald. Rep.*, p. 654; *Le Chevalier v. Lynch*, 1 *Douglas Rep.*, p. 170; *Sill v. Warwick*, 1 *H. Blackstone Rep.*, p. 639; *Quinn v. Keefe*, 2 *H. Blackstone Rep.*, p. 553; *Smith v. Buchanan*, 1 *East Rep.*, p. 6; *Potter v. Brown*, 5 *East Rep.*, p. 124; *Massé, Droit Commercial* tome 3, §§ 197–295; *Westlake, Private Int. Law*, ch. 7.)

§ 14. It is a general rule of law, that crimes are altogether local, and cognizable and punishable exclusively in the country where they are committed. No other nation, therefore, has any right to punish them, or is under any obligation to take notice of, or to enforce any judgment rendered in such cases, in the tribunals of another state. Hence, criminal laws may be applied to foreigners, and all persons resident within the territory, for all such persons owe a temporary allegiance to the state where they reside. But although a state takes no cognizance of offenses committed beyond its limits, and against the laws of another country, it nevertheless can punish the crimes of its own citizens, under its own laws, if within their reach, no matter where the crime may have been committed. Thus, the laws of treason are binding upon the subjects of a state, no matter where the treasonable act is done, for their allegiance, until changed, is considered as traveling with them, wherever they may go. (*Wheaton, Elem. Int. Law*, pt. 2, ch. 2, § 13; *Foelix, Droit Int. Prive.*, §§ 510–532; *American Jurist*, vol. 22, pp. 381–386; *Massé, Droit Commercial*, tome 2, §§ 39, et seq.; *Bowyer, Universal Public Law*, ch. 17; *Riquelme, Derecho Pub. Int.*, lib. 2, tit. 1, cap. 6.)

§ 15. It may be stated, in general terms, that the judicial power of a state is coëxtensive with its legislative power,



and is independent of every other state. This general position, however, must be qualified by the exceptions to its application arising out of express compacts with others, by which it may part with certain portions of its sovereign rights or modify the exercise of its powers as a sovereign and independent state. It must be noticed also that its judicial power does not embrace those cases in which the municipal claims of another nation operate within its territory, such as the cases of foreign ministers, or of a fleet, or army coming within its territorial limits, by its permission, either express or implied. It has already been stated that the maritime territory of every state extends to the ports, harbors, bays, mouths of rivers, and adjacent parts of the sea enclosed by headlands belonging to the same state, and that the general usage of nations has superadded the extent of one marine league, or the range of a cannon shot, along all its shores or coasts. Within these limits its right of territorial jurisdiction is absolute and excludes that of every other nation. Beyond these limits it may also exercise jurisdiction for certain special purposes, as the execution and enforcement of its revenue laws, etc., and over its own public and private vessels on the high seas, and its public, and, to a certain extent, its private vessels in foreign ports. (*Wheaton, Elem. Int. Law*, pt. 2, ch. 2, §§ 9, 12; *Webster, Dip. and Off. Papers*, pp. 140, et seq.; *Wildman, Int. Law*, vol. 1, pp. 70; *Le Louis*, 2 *Dod. Rep.*, p. 245; *Church v. Hubbard* 2 *Cranch. Rep.*, p. 234; *Massé, Droit Commercial*, tome 2, §§ 41, et seq.; *Bowyer, Universal Pub. Law*, ch. 16; *Heffler, Droit International*, § 59; *Bello, Derecho Internacional*, pt. 1, cap. 4, § 7; *Riquelme, Derecho, Pub. Int.*, lib. 2, tit. 1, cap. 1.)

§ 16. Continental jurists generally agree that, properly speaking, there are three places of jurisdiction; first, the *forum domicilii* or place of domicil of the party defendant; second, the *forum rei sitae*, or the place where the thing in controversy is situate; and third, the *forum contractus*, or *forum rei gestae*, or the place where the contract is made, or the act is done. These distinctions in jurisdiction result from the distinctions of the Roman civil law which have been introduced into the jurisprudence of most of the continental nations of modern Europe. In the corresponding

distribution of actions by the English common law into personal, real, and mixed actions, the former are generally capable of being brought wherever the party can be found, while the jurisdiction of the latter are confined to the place *rei sitae*; in other words, personal actions are *transitory*, while real and mixed actions are *local*. Considered in an international point of view, either the thing or the person made the subject of the jurisdiction, must be within the territory, for no sovereignty can extend its process beyond its own territorial limits so as to subject either persons or property to its judicial decisions; and every exertion of authority of this sort, beyond its limits, is a mere nullity, and incapable of binding such persons or property in any other tribunals. (*Story, Conflict of Laws*, §§ 537, 538; *Huberus, Prælectiones*, lib. 5, tit. 1; *Voet. ad Pand.*, lib. 5, tit. 1, §§ 64–149; *Henry, Foreign Law*, ch. 8, p. 54; ch. 9, p. 63; *Pardessus, Droit Com.*, tome 5, § 1353; *Boullenois, Traité des Lois*, tome 1, pp. 601–635; *Blackstone, Commentaries*, vol. 3, pp. 117, 118, 294; *Bowyer, Universal Public Law*, ch. 16; *Westlake, Private Int. Law*, chs. 5, 6; *Riquelme, Derecho Pub. Int.*, lib 2, tit. 1, cap. 3.)

§ 17. In regard to the citizens (native or naturalized) of a state, while within its territory, the jurisdiction of the sovereignty over them is complete and irresistible. It cannot be controlled, and ought everywhere to be respected. In regard to citizens domiciled abroad, nations generally assert a claim to regulate the rights, duties, acts, and obligations of their own citizens, wherever they may be domiciled. “And so far,” says Story, “as these rights, duties, obligations, and acts afterward come under the cognizance of the tribunals of the sovereign power of their own country, either for enforcement, or for protection, or for remedy, there may be no just ground to exclude this claim. But where such rights, duties, obligations, and acts come under the consideration of other countries, and especially of the country where such citizens are domiciled, the duty of recognizing and enforcing such claim of sovereignty, is neither clear, nor generally admitted. The most that can be said, is, that it may be admitted, *ex comitate gentium*; but it may also be denied, *ex justiciâ gentium*, wherever it is deemed to be injurious to the interests of foreign nations, or subversive of their policy or institutions. No one,

§ 20. With respect to jurisdiction, over personal property, Story says, the general doctrine is not controverted, that though movables are, for many purposes, to be deemed to have no *situs*, except that of the domicile of the owner, yet, this having but a legal fiction, it yields, whenever it is necessary for the purposes of justice, that the actual *situs* of the thing should be examined. The state, in whose territory personal property is actually situate, has as entire dominion, sovereignty and jurisdiction over it, while there, as it has over real property, and it may, to the same extent, regulate its transfer, subject it to process and execution, and control its uses and disposition. Hence it is, that, whenever personal property is taken by arrest, attachment, or execution, within a state, the title so acquired under the laws of the state, is held valid in every other state; and the same rule is applied to debts due non-residents, which are subjected to the like process under the local laws of the state. (*Story, Conflict of Laws*, § 550; *Ogden v. Falliot*, 3 Term. Rep., p. 733; *Bissell v. Briggs*, 9 Mass. Rep. pp. 462-469; *Massé, Droit Commercial*, tome 2, §§ 167, et seq.; *Bowyer, Universal Public Law*, ch. 16; *Westlake, Private Int. Law*, ch. 5-8; *Riquelme, Derecho Pub. Int.*, lib. 2, tit. 1, caps. 1-4.)

§ 21. Mr. Wheaton considers the rule, with respect to the jurisdiction of a state over personal property or movables within its territorial limits, to be the same as over immovables or real property, with this qualification, that foreign laws may furnish the rule of decision in cases where they apply, whilst the forms of process, rules of evidence and prescription, are governed by the *lex fori*. "Thus the *lex domicilii* forms the law in respect to a testament of personal property, or succession *ab intestato*, if the will is made, or the party on whom the succession devolves resides, in a foreign country; whilst, at the same time, the *lex fori* of the state, in whose tribunals the suit is pending, determines the forms of process and prescription. Though the distribution of the personal effects of an intestate is to be made according to the law of the place where the deceased was domiciled, it does not, therefore, follow that the distribution is, in all cases, to be made by the tribunals of that place, to the exclusion of those of the country where the property is situate. Whether the tribunal

absolutely to bind the rights and titles to immovable property." (*Story, Conflict of Laws*, §§ 541–544; *Huberus, Prælectiones*, lib. 1, tit. 2, § 2; *Henry, Foreign Law*, ch. 8, p. 54; ch. 9, p. 63; *Vattel, Droit des Gens*, liv. 1, ch. 19, § 218; liv. 2, ch. 8, §§ 99–103; *Pardessus, Droit. Comm.*, tome 5, § 1476–1478; *Wildman, Int. Law*, vol. 1, p. 40; *Grotius, de Jur. Bel. ac Pac.*, lib. 2, cap. 18, § 4; *Massé, Droit Commercial*, tome 2, §§ 164, et seq.; *Riquelme, Derecho Pub. Int.*, lib. 2, tit. 1, cap. 2.)

§ 19. The jurisdiction of a state over all real property within its territory, results, as a necessary consequence of the rule relating to the application of the *lex loci rei sitae*. As everything relating to the tenure, title, transfer, descent, and testamentary disposition of real property, is regulated by the local law, so, also, all proceedings in courts of justice relating to that species of property, such as the rules of evidence, the forms of action and pleadings, and rules of decision, must necessarily be governed by the same law. This jurisdiction is exclusive. "In respect to immovable property," says Story, "every attempt of a foreign tribunal to found a jurisdiction over it, must, from the very nature of the case, be utterly nugatory, and its decree must be forever incapable of execution *in rem*." "It is true that property within a country, does not make the owner generally a subject of the sovereign where it is locally situate, but it subjects him to his jurisdiction *secundum quid, et aliquo modo*. Mixed actions, so far as they regard the realty, are to be brought in the place *rei sitae*, but if the personal damages or claims be separable in their nature and character, they may be sued for as personal actions." The rule of common law is, that personal actions may be brought in any place where the party defendant can be found; that real actions must be brought in the *forum rei sitae*; and that mixed actions, which are deemed local, are properly referrible to the same tribunals. (*Wheaton, Elem. Int. Law*, pt. 2, ch. 2, §§ 3, 16; *Story, Conflict of Laws*, §§ 551–555; *Huberus, Prælectiones*, lib. 1, tit. 3, § 15; *Henry, Foreign Laws*, ch. 8, § 3; *Vattel, Droit des Gens*, liv. 2, ch. 8, § 103; *Daulson v. Mathews*, 4 *Term. Rep.*, 503; *Livingston v. Jefferson*, 4 *Hall's Am. Law Jour.*, p. 78; *Moslyn v. Fabrigas*, *Cowper Rep.*, pp. 161–176; *Massé, Droit Commercial*, tome 2, §§ 165, et seq.; *Westlake, Private Int. Law*, ch. 6; *Riquelme, Derecho Pub. Int.*, lib. 2, tit. 1, cap. 8.)

tutory provision prohibiting or regulating the disposition of property by a particular kind of contract, such a disposition will be considered good and valid. On this point, Pothier, in his *Traité des personnes*, in discussing the laws of France, thus describes the origin and character of this class of contracts: "Although foreigners may make all sorts of contracts *inter vivos*; although they may, in this manner, dispose of property which they may acquire in France, either by titles onerous or gratuitous, they cannot dispose of property which they own in France, either by testament, or by any other act *causa mortis*, in favor of foreigners or citizens; neither can foreigners take anything by testament, or by any other act *causa mortis*, although they are capable of donations *inter vivos*. This difference, which the law establishes between acts *inter vivos* and acts *causa mortis*, in permitting foreigners to do the former, and prohibiting them from doing the latter, is founded on the very nature of these acts. Acts *inter vivos* are founded on the *droit des gens*, (*jus gentium*—or law of nature.) Foreigners enjoy every right which arises from the *jus gentium*. They may, therefore, perform all sorts of acts *inter vivos*. The right to make a testament, active or passive, is, on the contrary, derived from the civil law—*testamenti factio est juris civilis*—foreigners not enjoying what is of civil law, have not this faculty or right." By the Roman law, the power to make a testament belonged peculiarly and exclusively to citizens. So provides the second cap. Falcidian law. A foreigner, therefore, could not use this power. The decemviral law had granted it to the fathers of families, whom it invested, by this act, with the character of legislators, which would have been degraded if exercised by any other than Roman citizens. In some states, the treasury appropriates the property of foreigners who die there; hence arises their inability to make a testament; but this barbarous law is a disgrace to any legislation. The French law, as we have seen from Pothier, adopted the maxim of the Roman law, *factio testamenti est juris civilis*. For that reason, a foreigner could not dispose of property by testament. He was forbidden by municipal law. But, says Pothier, the right to dispose of property by acts *inter vivos* is founded on the *jus gentium*, the law of nature. And, in truth, it cannot be otherwise. *Dominium*, or the right over things

which are ours, consists, according to all writers who have defined it, of two parts, first, the right to dispose of the thing, and secondly, the right to enjoy it exclusively. When either part is wanting, the *dominium* is mutilated. The right to acquire property is the right to hold this *dominium* over things, and no man can be said to have full property in a thing, who has not the right to dispose of it and to enjoy it exclusively. The *jus disponendi* exists then, necessarily, where there is the full right of property. (*Pothier, Traité des personnes*, pt. 1, tit. 2, sec. 2; *Sala Mexicana*, tomo 2, pp. 109, 110; *Westlake, Private Int. Law*, chs. 8, 9; *Riquelme, Derecho Pub. Int.*, lib. 2, tit. 1, caps. 1-4.)

§ 23. From the same principle results the distinction which is generally made by the courts of the United States between a foreign voluntary assignment for the benefit of creditors, and a foreign assignment in bankruptcy. The *jus disponendi* applies to the former, whereas an assignment under the bankrupt law, is a proceeding *in invitum*; the one is a universal natural right applicable everywhere, while the other is a forcible disposition, having its origin in local law, and confined to the jurisdictional limits of the maker of the law. Story, in his *Conflict of Laws*, § 411, (third edition,) says: "There is a marked distinction between a voluntary conveyance by the owner, and a conveyance by mere operation of law in cases of bankruptcy *in invitum*. Laws cannot force the will, nor compel any man to make a conveyance. In place of a voluntary conveyance of the owner, all that the legislature of a country can do, when justice requires it, is to assume the disposition of his property *in invitum*. But a statutable conveyance, made under the authority of any legislature, cannot operate upon any property except that which is within its own territory. This makes a solid distinction between a voluntary conveyance of the owner and an involuntary conveyance by the mere authority of the law. The former has no relation to place, the latter, on the contrary, has the strictest relation to place. The distinction is insisted on with great force by Lord Kaimes. It is, therefore, admitted, that a voluntary assignment by a party, according to the law of the domicil, will pass his personal estate, *whatever may be its locality abroad, as well as at home*. But it by no means follows that the same rule should

govern in cases of assignments by operation of law." The courts of Great Britain apply the rule of comity generally to the laws of bankruptcy as well as to voluntary assignments. (*Story, Conflict of Laws*, §§ 408-411; *Kaims, On Equity*, b. 3, ch. 8, § 6; *Kent, Com. on Am. Law*, vol. 2, pp. 404-408; *Westlake, Private Int. Law*, ch. 9; *Forbes v. Scannel*, 13 *Cal. Rep.*, p. 242.)

§ 24. Public and private vessels, on the high seas and out of the territorial limits of any other state, are subject to the jurisdiction of the state to which they belong. The ocean is common to all mankind, and may be successively used by all as they have occasion. According to Vattel, the domain of a nation extends to all its just possessions, not merely possessions of territory, but also of rights it is entitled to enjoy. It has the right to navigate the ocean which is the territory of no one, and its jurisdiction over its vessels so employed on the high seas, results from this right (*droit*), rather than from the jurisdiction which it is entitled to exercise over the persons who compose its fleets or man its private vessels. But this jurisdiction is exclusive, only so far as respects offenses against its own municipal laws, and not as respects offenses against the law of nations, which may be punished in the competent tribunal of any country where the offender may be found, or into which he may be carried, although committed on board a foreign vessel on the high seas. But this jurisdiction of the courts of one nation over international offenses committed on board the vessels of another on the high seas, when such vessels are brought within its territorial limits, does not extend to the right of visitation and search for the purpose of obtaining the custody of the offenders, in time of peace, unless expressly permitted by international compact. The right of search for contraband and enemy's goods, in time of war, results from the rights of war, and rests upon principles essentially different, as will be hereafter shown. (*Wheaton, Elem. Int. Law*, pt. 2, ch. 2, §§ 10, 15; *Vattel, Droit des Gens*, liv. 1, ch. 19, § 216; liv. 2, ch. 7, § 80; *Grotius, de Jur. Bel. ac Pac*, lib. 2, cap. 3, § 13; *Rutherford, Institutes*, b. 2, ch. 9, §§ 8, 9; *The Louis*, 2 *Dodson's Rep.*, p. 238; *The Antelope*, 10 *Wheaton Rep.*, p. 122; *The Marianna Flora*, 11 *Wheaton Rep.*, p. 39; *Cushing, Opinions of U. S.*

*Atty's. Genl.*, vol 8, pp. 73, et seq.; *Riquelme, Derecho Pub. Int.*, lib. 1, pt. 2, cap. 9; *Ortolan, Diplomatie de la Mer*, lib. 2, ch. 13.)

§ 25. Where there are no express prohibitions, the ports of one state are considered as open to the public armed and commissioned vessels of every other nation with whom it is at peace. Such ships are exempt from the jurisdiction of the local tribunals and authorities, whether they enter the ports under an express permission, stipulated by treaty, or a permission implied from the absence of prohibition. This exemption extends not only to the belligerent ships of war, privateers, and the prizes of either, who seek a temporary refuge in neutral waters from the casualties of the sea and war, but also to prisoners of war, on board any prize or public vessel of her captor. Such vessels, in the command of a public officer, possesses, in the ports of a neutral, the rights of ex-territoriality, and are not subject to the local jurisdiction. But if such prisoners of war be taken on shore, in a neutral port, they become subject to the local jurisdiction, or not, according as it may be agreed between the political authorities of the belligerent and the neutral powers. Foreign troops, stationed in, or passing through the territory of another state, with whom the foreign state is in amity, are undoubtedly exempt from the civil and criminal jurisdiction of the place. But this right of passage is derived from an express and not an implied permission, which may be given with specified limitations. (*Wheaton, Elem. Int. Law*, pt. 2, ch. 2, § 9; *Kent, Com. on Am. Law*, vol. 1, p. 157, note; *Cushing, Opinions U. S. Atty's Genl.*, vol. 7, p. 123; *Foelix, Droit International Privé.*, § 164; *Ortolan, Diplomatie de la Mer*, liv. 2, ch. 13; *The Schooner Exchange v. McFadden et al.*, 7 *Cranch Rep.*, p. 135; *Phillimore, On Int. Law*, vol. 1, § 341; *Hautefeuille, Des Nations Neutres*, tome 1, pp. 475, 476; *The Betsey*, 3 *Dallas Rep.*, p. 6; *The Cassius*, 3 *Dallas Rep.*, p. 121; *The Alerto*, 9 *Cranch Rep.*, p. 859.)

§ 26. Private vessels of one state entering the ports of another, are not, in general, exempt from the local jurisdiction, unless by express compact, and to the extent provided by such compact. But there are certain exceptions to this rule, which result from the right of asylum, based on the



laws of humanity. A vessel driven by stress of weather, or carried by unlawful force into a prohibited port, or into an open port with prohibited articles on board, incurs no penalty or forfeiture, in either case. The cases of blockade and carrying contraband, are familiar examples of the principle. But the rule of law, and the comity and practice of nations, go much further than these cases of necessity, and allow a merchant vessel of one state, coming into an open port of another, voluntarily, for the purposes of lawful trade, to bring with her, and keep over her, to a very considerable extent, the jurisdiction and authority of the laws of her own country, excluding, to this extent, by consequence, the jurisdiction of the local law. This jurisdiction of a nation over its vessels, while lying in the port of another, is wholly exclusive. For any unlawful acts done by her while thus lying in the port of another state, and for all contracts entered into while there, by her master or owners, she is made answerable to the laws of the place. Nor, if her master or crew, while on board in such port, break the peace of the community by the commission of crimes, can exemption from the local laws be claimed for them. But the comity and practice of nations have established the rule of international law, that such vessel, so situated, is, for the general purpose of governing and regulating the rights, duties and obligations of those on board, to be considered as a part of the territory of the nation to which she belongs. The local authorities, therefore, have a right to enter on board a foreign merchantman in port, for the purpose of inquiry universally, but for the purpose of arrest, only in matters within their ascertained jurisdiction. It, therefore, follows, that, with respect to facts happening on board, which do not concern the tranquility of the port, or persons foreign to the crew, or acts committed on board while such vessel was on the high seas, are not amenable to the territorial justice. All such matters are justiciable only by the courts of the country to which the vessel belongs. So firmly is this doctrine incorporated into the practice of nations, that the French regard it as a positive rule of international law, and the French laws do not hesitate to prescribe that, when crimes are committed on board a French vessel in a foreign port, by one of the crew against another of the same

crew, the French consul is to resist the application of the local authority to the case. (*Wheaton, Elem. Int. Law*, pt. 2, ch. 2, § 9; *Webster, Dip. and Off. Papers*, pp. 85, 86; *Massé, Droit Commercial*, tome 2, §§ 31–44; *Ortolan, Dip de la Mer*, liv. 2, ch. 13; *Vattel, Droit des Gens*, liv. 2, ch. 1, § 123; *Legaré, Opinions of U. S. Attorney's General*, vol. 4, p. 98; *Riquelme, Derecho Internacional*, lib. 1, tit. 2, cap. 9; *Cushing, Opinions of U. S. Atty's Genl.*, vol. 8, pp. 73, et seq.; *De Clercq, Formulaire*, tome 1, p. 366; tome 2, p. 65; *The Schooner Exchange v. McFadden*, 7 *Cranch Rep.*, p. 144; *The Creole, Com. between the U. S. and Great Britain*, p. 241; *The Enterprise, Com. between U. S. and G. B.*, p. 187; *Hello, Revue de Législation*, tome 17, p. 143; *Wirt, Opinions U. S. Atty's Genl.*, vol. 2, p. 86; *Berrien, Opinions U. S. Atty's General.*, vol. 2, p. 378.)

§ 27. It may be stated, in general terms, that the judicial power of every sovereign state extends: 1st. To all civil proceedings, *in rem*, relating to immovable or real property within its territory; 2d. To all civil proceedings, *in rem*, relating to movable or personal property within its territory; 3d. To all mixed actions, relating to real and personal property within its territory; 4th. To all its public and private vessels on the high seas, to its public vessels and their prizes in foreign ports, and, in certain cases, to its private vessels in foreign ports; 5th. To all controversies respecting personal rights and contracts, or injuries to the person or property, when the person resides within the territory, wherever the cause of action may have originated. In this class of controversies, the judicial power may or may not be exercised, according as is provided by municipal law. This general principle is entirely independent of the rule of the decision which is to govern the tribunal.

With respect to criminal matters, the judicial power of the state extends, with certain qualifications: 1st. To the punishment of all offenses against its municipal laws, by whomsoever committed, within its territory; 2d. To the punishment of all such offenses, by whomsoever committed, on board its public or private vessels on the high seas, and on board its public vessels, and, in some cases, on board its merchant vessels in foreign ports; 3d. To the punishment of all such offenses by its own subjects, wheresoever committed;

4th. To the punishment of piracy, and other offenses against the law of nations, by whomsoever and wheresoever committed. (*Wheaton, Elem. Int. Law*, pt. 2, ch. 2, §§ 1-13; *Phillimore, On Int. Law*, part 3, chs. 18, 19, 20; *Story, Conflict of Laws*, § 530-583; *Henry, Foreign Law*, chs. 8, et seq.; *Huber, Praelectiones*, lib. 1, tit. 3; *Bowyer, Universal Public Law*, chs. 16, 17; *Cushing, Opinions U. S. Atty's Genl.*, vol. 8, p. 73; *Riquelme, Derecho Internacional*, tomo 1, pp. 243-245; *Gardner, Institutes*, pp. 1-37.)

§ 28. The power of a state over the person of the party guilty of, or charged with, criminal offenses, is necessarily limited to the extent of its own territory, or to the high seas which is the common territory of all, or to its vessels in foreign ports; for no sovereign state is bound, unless by special compact, to deliver up persons, whether its own subjects or foreigners, charged with, or convicted of, crimes under the laws of another country, upon the demand of a foreign state or its officers. The extradition of persons charged with, or convicted of, criminal offenses affecting the general peace and happiness of society, is voluntarily practised by most states, where there are no special compacts, as a matter of general convenience and comity. Some distinguished jurists have treated this question as a matter of strict right, and as constituting a part of the law and usage of nations. Others, equally distinguished, explicitly deny it as a matter of right. The weight of authority is in favor of regarding it as a matter of comity, rather than of strict right, under the rules of international law as universally received and established among civilized nations. If it be regarded as a right at all, it is one of those *imperfect* rights which cannot be enforced, as the obligation on the other party is also imperfect, and not universally, even if generally, admitted. (*Grotius, de Jur. Bel. ac Pac.*, lib. 2, cap. 11, §§ 3-5; *Wheaton, Elem. Int. Law*, pt. 2, ch. 2, § 13; *Phillimore, On Int. Law*, vol. 1, §§ 349, et seq.; *Kent, Com. on Am. Law*, vol. 1, pp. 35-38; *Story, Conflict of Laws*, §§ 626-628; *Burlamaqui, Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 3; *Vattel, Droit des Gens*, liv. 2, ch. 6, §§ 76, 77; *Rutherford, Institutes*, b. 2, ch. 9, § 12; *Martens, Precis du Droit des Gens*, §§ 91-101; *Klüber, Droit des Gens*, pt. 2, tit. 1, ch. 2, § 66; *Foelix, Droit Int. Privé*, liv. 1, tit. 9,

ch. 7; *Massé, Droit Commercial*, tome 2, § 44; *Bowyer, Universal Public Law*, ch. 17; *Cushing, Opinions U. S. Atty's Genl.*, vol. 8, p. 73; *Riquelme, Derecho Pub. Int.*, lib. 2, tit. 2, cap. 5.)

§ 29. A criminal sentence, pronounced under the municipal law of one state, can have no legal effect in another. If it be a conviction, it cannot be executed without the limits of the state in which it is pronounced; and if such conviction be attended with civil disqualifications in the country where pronounced, these disqualifications do not follow the offender into another independent state. In the words of Martens, "a sentence which attacks the honor, rights, or property of a criminal, cannot extend beyond the courts of the territory of the sovereign who has pronounced it, so that he who has been declared infamous, is infamous in fact but not in law. And the confiscation of his property cannot effect his property situate in a foreign country. To deprive him of his honor and property, judicially, there also, would be to punish him a second time for the same offense." It follows, from this well established principle, that if a delinquent should fly from one jurisdiction to another, for the purpose of obtaining a milder punishment, or an acquittal in the tribunals of the country where he should take refuge, such sentence would be a nullity, and of no avail to protect him against a prosecution in the state to which he owed allegiance, or in which the crime was committed. But a conviction or acquittal, in the state where the offense was committed, or to which he owed allegiance, would, of course, be an effectual bar to a prosecution in any other state. (*Wheaton, Elm. Int. Law*, pt. 2, ch. 2, § 14; *Martens, Precis du Droit des Gens*, §§ 86, 94, 104; *Kluber, Droit des Gens Mod.*, pt. 2, tit. 1, ch. 2, §§ 64, 65; *Foelix, Droit Int. Privé*, § 565; *Bowyer, Universal Public Law*, ch. 17; *Westlake, Private Int. Law*, ch. 11; *Riquelme, Derecho Pub. Int.*, lib. 2, tit. 2, cap. 3.)

§ 30. The conclusiveness of foreign sentences and judgments, where they are drawn in question in the tribunals of another state, will depend upon the nature of the action, and the usage of the different nations, and the special compacts between them. In personal actions, *res adjudicata*, in one country, can have, *per se*, no effect in another. The effect attached to a foreign judgment is different in different coun-

tries. In English and American courts, a foreign judgment is *prima facie* evidence where the party claiming the benefit of it applies to have it enforced, and it lies on the defendant to impeach the justice of it, or to show that it was irregularly obtained. If this is not shown, it is received as evidence of a debt; but if it appears, from the record of the proceedings upon which the original judgment was founded, that it was unjustly or fraudulently obtained, or resulted from false premises, or a palpable mistake of the law applicable to the case, it will not be enforced. In France, the operation of a foreign judgment is restrained within still narrower limits. As between different states, united together into a composite state or federal union, the organic constitution, or municipal law, will determine the degree of credit and effect which a judgment obtained in one shall have in the other states. Thus, in the United States of America, a judgment in one state has, in all the others, the conclusive effect of a domestic judgment. (*Kent, Com. on Am. Law*, vol. 2, p. 119; *Wheaton, Elem. Int. Law*, pt. 2, ch. 2, § 21; *Vattel, Droit des Gens*, liv. 2, ch. 7, §§ 84, 85; *Martens, Precis du Droit des Gens*, §§ 93-95; *Klüber, Droit des Gens*, § 59; *Foelix, Droit Int. Privé*, §§ 298-311; *Frankland v. McGusty*, 1 *Knapp. Rep.*, p. 274; *Bequet v. McCarty*, 3 *Barn. and Ad. Rep.*, p. 951; *Mills v. Duryee*, 7 *Cranch. Rep.*, p. 481; *Hampton v. McConnell*, 3 *Wheaton Rep.*, p. 234; *Massé, Droit Commercial*, tome 2, §§ 298-325; *Bowyer, Universal Public Law*, chs. 17, 21; *Riquelme, Derecho Pub. Int.*, lib. 2, tit. 1, cap. 9; *Westlake, Private Int. Law*, ch. 12; *Gardner, Institutes*, p. 146.)

§ 31. Foreign judgments, or sentences of a court of competent jurisdiction, proceeding *in rem*, such as the sentences of prize courts, courts of admiralty, and revenue courts, are conclusive as to the proprietary interest in, or title to, the thing in question, wherever the same comes incidentally in controversy in the tribunals of another state. "Whatever doubts may exist," says Wheaton, "as to the conclusiveness of foreign sentences, in respect of facts collaterally involved in the judgment, the peace of the civilized world, and the general security and convenience of commerce, obviously require that full and complete effect should be given to such sentences, wherever the title to the specific property, which

has been once determined in a competent tribunal, is again drawn in question in any other court or country." (*Wheaton, Elem. Int. Law*, pt. 2, ch. 2, § 18; *Vattel, Droit des Gens*, liv. 2, ch. 7, §§ 84, 85; *Story, Conflict of Laws*, §§ 585, 591–598; *Croudson v. Leonard*, 4 *Cranch. Rep.*, p. 434.; *Gilston v. Hoyt*, 8 *Wheat. Rep.*, p. 246; *Duchess of Kingston case*, 11 *Howell's State Trials*, p. 261; *Massé, Droit Commercial*, tome 2, §§ 298–325.)

§ 82. If a foreign court exercises a jurisdiction which, according to the law of nations, its sovereign could not confer upon it, its sentence or judgment is not available in the courts of any other state, and the courts in which such judgment is brought in controversy will determine the question of jurisdiction for themselves; but so far as its jurisdiction depends upon municipal law, or its proceedings are governed by municipal rules, it is the exclusive judge of its own jurisdiction and of the regularity of its own proceedings, and its decision on these points binds the world. "Of its own jurisdiction," says Chief Justice Marshall, "*so far as depends on municipal rules*, the court of a foreign nation must judge, and its decision must be respected." If the proceedings are "merely irregular, the courts of the country pronouncing the sentence were the exclusive judges of that irregularity, and their decision binds the world." Thus, if the court of one country condemn a vessel as a prize under the *law of nations*, and the sentence is brought in controversy in the court of another state, the latter may examine into, not only the "authority of the former to act as a prize court," but also "whether the vessel condemned was in a situation to subject her to the jurisdiction of that court." But "if the matter in controversy is land, or other immovable property, the judgment pronounced in the *forum rei sitae*, is held of universal obligation, as to all the matters of right and title which it professes to decide in relation thereto. And this results from the very nature of the case, for no other court can have a competent jurisdiction to inquire into or settle such right or title. By the general consent of nations, therefore, the judgment of the *forum rei sitae*, is held absolutely conclusive. *Immobilia ejus jurisdictionis esse reputantur, ubi sita sunt.* And the same principle is applied to all other cases of proceeding,

*in rem*, as to movable property, within the jurisdiction of the court pronouncing the judgment. Whatever it settles as to the right or title, or whatever disposition it makes of the property by sale, revendication, transfer, or other act, will be held valid in every other country, where the same question comes, directly or indirectly, in judgment before any other tribunal." (*Story, Conflict of Laws*, §§ 584–592; *Vattel, Droit des Gens*, lib. 2, ch. 7, §§ 84, 85; *Rose v. Himely*, 4 *Cranch. Rep.*, pp. 241, et seq.; *Boullenois, Traité des Lois*, tome 1, pp. 618–623; *Croudson v. Leonard*, 4 *Cranch. Rep.*, p. 434; *Williams v. Armroyd*, 7 *Cranch. Rep.*, p. 423; *Grant v. McLachlin*, 4 *Johns. Rep.*, p. 34.)

§ 33. As a general rule, courts do not take judicial notice of the laws of a foreign country, but they must be proved, not as facts to the jury, but as facts to the court. The court, therefore, decides what is the proper evidence of such laws, and of their applicability to the case in hand. The manner of proof must vary, according to circumstances. The general principle is, that the best proof shall be required which the nature of the case admits of. But to require such proof of the laws of a foreign state as its institutions and usages do not admit of, would be unjust and unreasonable. The usual modes of authenticating the written laws of a foreign country are, by an exemplification of a copy under the great seal of the state, or by a certificate of some duly authorized officer, which certificate must be duly authenticated, or by a copy proved to be a true copy. Some states do not use any great seal for such purposes, but copies of the laws, decrees, and orders are certified to by the minister, with his signature and rubric, or signature alone, under whose care the archives are kept. In others, there is a particular officer appointed as keeper of the archives, and who is authorized to authenticate copies thereof. The rule of evidence must therefore vary with the institutions and usages of the country whose written laws are to be proved. "But foreign unwritten laws, customs, and usages," says Story, "may be proved, and indeed must ordinarily be proved, by parol evidence. The usual course is, to make such proof by the testimony of competent witnesses, instructed in the law, under oath. Sometimes, however, certificates of persons in high authority have

been allowed as evidence." These questions of evidence are generally determined by the municipal laws of the place where the foreign law is to be proved. (*Story, Conflict of Laws*, §§ 637–643; *Gardner, Institutes*, p. 142, etc.; *Church v. Hubbard*, 2 *Cranch. Rep.*, p. 238; *In Re Dormy*, 3 *Hagg. Rep.*, p. 467–469; *Mostyn v. Fabrigas*, *Cowper Rep.*, p. 174; *Lincoln v. Battel*, 6 *Wendell Rep.*, p. 475.)

§ 34. The same may be said of the proof of contracts, instruments, and other acts made or done in one country, and offered in evidence in another. In some cases, it is sufficient to prove them in the manner and by the solemnities and proofs which are deemed sufficient by the law of the place where they are executed; and, in others, they are required to be proved according to the law of the place where the action or other judicial proceeding is instituted. On this subject, the law and practise of different states differ, as also the opinions of publicists. "There are very few traces to be found in the reports of the common law," says Story, "of any established doctrines on this subject." Where such instruments and acts can be proved according to the *lex fori*, such proofs are usually required, but if such evidence cannot be produced, and there is no municipal law to the contrary, evidence deemed competent in the place where the instruments were executed, is usually admitted in the place where the proceeding is instituted. Thus, in Scotland, if the law of the foreign country allows the payment of a debt constituted by writing to be proved by parol, such proof is allowed, although, if the contract had been so made in Scotland, it would not be extinguished by such evidence. In France, proof is admitted by parol of a debt contracted in England, although such proof was not admissible in such a contract made in France. (*Voet, De Stat.*, ch. 2, No. 9, § 5; *Story, Conflict of Laws*, §§ 629, 636; *Erskine, Institutes*, b. 3, tit. 2, §§ 39, 40; *Starkie, On Evidence*, pt. 2, §§ 130–131; *Trasher v. Everhart*, 3 *Gill. and Johns. Rep.*, pp. 234, 242; *Cogswell v. Dolliver*, 2 *Mass. Rep.*, p. 217; *Mostyn v. Fabrigas*, *Cowper Rep.*, p. 174; *Massé, Droit Commercial*, tome 2, §§ 326, et seq.; *United States v. Wiggins*, 14 *Peters. Rep.*, p. 347; *Owings v. Hull*, 9 *Peters. Rep.*, p. 625; *United States v. Perchman*, 7 *Peters. Rep.*, p. 85; *United States v. Delespine*, 12 *Peters. Rep.*, p. 655; *Gaines v. Relf, et al.*, 12 *Howard*



*Rep.*, p. 522; *Houston v. Perry, et al.*, 3 *Texas Rep.*, p. 392; *Bowman v. Sandburn*, 5 *Foster's Rep.*, p. 113; *Mauri v. Hefferman*, 13 *Johns. Rep.*, p. 72; *In the matter of Marianne Clericetti*, 80 *Eng. Law and Eq. Rep.*, p. 582; *Riquelme, Derecho Pub. Int.*, lib. 2, tit. 1, cap. 3; *Gardner, Institutes*, pp. 111, 120, etc.)

§ 35. Foreign judgments are, as a general rule, to be authenticated in the same manner as other instruments and documents executed in another country. The most usual mode of proof is by an exemplification under the great seal, but this is by no means the only one. The public seal of a foreign sovereign or state, affixed to a judgment, is generally the highest and most convenient evidence of its authority. "Courts of other countries," says Story, "will judicially take notice of such public seal, which is therefore considered as proving itself. But the seal of a foreign court does not prove itself, and therefore must be established as such by competent testimony. There is an exception to this rule in favor of courts of admiralty, which, being courts of the law of nations, the courts of other countries will judicially take notice of their seal, without positive proof of its authenticity." Chief Justice Marshall has laid down the general rule, with respect to the authentication of foreign judgments, and which is also applicable to almost all foreign documentary evidence, as follows: "Foreign judgments are authenticated, *first*, by an exemplification under the great seal; *secondly*, by a copy proved to be a true copy; *thirdly*, by a certificate of an officer authorized by law, which certificate must itself be properly authenticated. These are the usual, and appear to be the most proper, if not the only, modes of verifying foreign judgments. If they be all beyond the reach of the party, other testimony, inferior in its nature, might be received." But this inferior class of testimony will not be received unless it be shown that there was some insuperable impediment to the use of either of these modes, for, continues Chief Justice Marshall, "the court cannot presume such impediment to have existed." There are numerous cases illustrating the application of these rules, and showing the admissibility of inferior evidence where the original documents could not be produced by the party, and where there were insuperable impediments to the

use of either of the modes of proof specified. All these cases, however, are referable to the general principle, that the party offering documentary evidence must produce the best in his power, or the best which, under the circumstances of the case, he was able to procure. No one can be required to do an impossibility, nor will any one be deprived of his rights for not producing what is beyond his reach. (*Story, Conflict of Laws*, § 643; *Massé, Droit Commercial*, tome 2, §§ 336, et seq.; *Starkie, On Evidence*, pt. 2, § 92; *Phillips, On Evidence*, vol. 1, p. 432; vol. 2, pp. 133, et seq.; *Westlake, Private Int. Law*, ch. 12; *Gardner, Institutes*, p. 146; *Church v. Hubbard*, 2 *Cranch. Rep.*, p. 238; *Henry v. Adey*, 3 *East Rep.*, p. 221; *Andrews v. Herriott*, 4 *Cowen Rep.*, p. 526, note; *Yeaton v. Fry*, 5 *Cranch. Rep.*, p. 335; *Thompson v. Stewart*, 3 *Conn. Rep.*, p. 171; *Delafeld v. Hurd*, 3 *Johns. Rep.*, p. 310; *De Sobry v. De Laistre*, 2 *Harr. and Johns. Rep.*, p. 193; *Prichard v. Bailey*, 6 *Foster's Rep.*, p. 167; *Spaulding v. Vincent*, 24 *Vermont Rep.*, p. 504; *Cotten v. Underhill*, 4 *McLean Rep.*, p. 199; *Stewart v. Swanzy*, 23 *Miss. Rep.*, p. 502.)

## CHAPTER VIII.

## RIGHTS OF LEGATION AND TREATY.

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§ 1. Another essential attribute of sovereignty is *the right of legation and treaty*. Legation consists in sending diplomatic agents to other states, and in receiving such as are sent by them. This right of an independent sovereign state to send and receive diplomatic agents, is regarded, in international law, as a *perfect* one; but the obligation to do so is deemed *imperfect*, for, strictly speaking, no state can be compelled

either to send or to receive such agents. Nevertheless, usage and comity have established a sort of reciprocal duty in this respect. The maintenance of permanent diplomatic missions between different states is regarded as evidence of a mutual desire to continue the relations of peace and amity. On the contrary, a refusal to establish such means of diplomatic intercourse, or a discontinuance of them when once established, is, in most cases, regarded as an indication of unfriendly feeling, or, at least, of an indisposition to cultivate amicable relations. This, however, will depend very much upon the nature and importance of the relations between the states, and their ability to maintain permanent diplomatic missions. If two states be so situated that they can have very little commercial or political intercourse, such missions would be unnecessary. Moreover the smaller states can hardly be expected to bear the burthen of the expense of maintaining them with all other states. (*Wheaton, Elms. Int. Law*, pt. 3, ch. 1, § 2; *Vattel, Droit des Gens*, liv. 4, ch. 5, §§ 55–65; *Real, Science du Gouvernement*, tome 5, p. 140; *Rousset, Ceremonial Diplom.*, tome 2, p. 481; *Riquelme, Derecho Pub. Int.*, lib. 2, tit. 2, cap. Ad. 1; *Horne, On Diplomacy*, sec. 1, §§ 5, 6; *Wicquefort, L'Ambassadeur et ses fonctions*, liv. 1, ch. 3; *Rutherford, Institutes*, b. 3, ch. 9, § 20; *Martens, Precis du Droit des Gens*, §§ 185–190; *Polson, Law of Nations*, sec. 5; *Phillimore, On Int. Law*, vol. 2, § 114; *Ompeda, Litteratur Volkerrecht*, vol. 2, p. 351; *Martens, Guide Diplomatique*, § 5; *Bowyer, Universal Public Law*, ch. 20; *Bello, Derecho Internacional*, pt. 3, cap. 1, § 2; *Heffter, Droit International*, § 200.)

§ 2. How far the rights of legation belong to a semi-sovereign or dependent state, must depend upon its relations to the superior with which it is connected or under whose protection it is placed. Its sovereignty not being complete, it may, or may not be, entitled to a right incident to sovereignty, according to the nature and circumstance of the case. Thus, by the constitution of the United States of America, every state is expressly forbidden from entering, without the consent of congress, into any agreement or compact with another state, or with a foreign power, and their original power of sending and receiving public ministers is essentially modified, if not entirely taken away,

by this prohibition. Under the constitution of the German Empire, and the Germanic Confederation, of the Swiss Confederation, and of the former United Provinces of the low countries, the right of legation was preserved by the princes and states composing these unions. (*Wheaton, Elem. Int. Law*, pt. 3, ch. 1, § 3; *Vattel, Droit des Gens*, liv. 4, ch. 5, § 60; *Klüber, Droit des Gens Mod.*, pt. 2, tit. 2, ch. 3, § 175; *Horne, On Diplomacy*, sec. 1; *Heffler, Droit International*, § 200; *Philimore, On Int. Law*, vol. 2, § 116; *Martens, Guide Diplomatique*, § 5; *Riquelme, Derecho Pub. Int.*, lib. 2, tit. 2, cap. Ad. 1; *Bello, Derecho Internacional*, pt. 3, cap. 1, § 2; *Merlin, Repertoire*, verb. *Ministre Public*, sec. 2, § 6.)

§ 3. Strictly speaking, every state has the exclusive right to determine in whom its sovereign authority is vested. Nevertheless, in case of a revolution or civil war, foreign states must, of necessity, judge for themselves whether they will continue their accustomed diplomatic relations with the former government, or commence them with the revolutionary party. This is sometimes a question of great delicacy, and in order to avoid any positive decision of it, diplomatic intercourse is either entirely suspended until the final termination of the contest, or is partially kept up by means of diplomatic agents, of special and limited authority, who are not vested with full ministerial powers, nor entitled to diplomatic honors. But where the accustomed diplomatic relations are to be maintained, the safest and least objectionable rule is, to continue them with the *de facto* government, whatever that may be, because, for the time being, that may properly be regarded as representing the sovereignty of the state. (*Bello, Derecho Internacional*, pt. 3, cap. 1, § 2; *Wheaton, Elem. Int. Law*, pt. 3, ch. 1, § 4; *Vattel, Droit des Gens*, liv. 2, ch. 4, § 56; *Martens, Precis du Droit des Gens*, §§ 79–82; *Merlin, Repertoire*, verb. *Minst. Pub.*, sec. 2, § 6; *Martens, Guide Diplomatique*, § 5.)

§ 4. As a state is not under a perfect obligation to receive diplomatic agents from another, it may refuse to receive any particular individual, either on the ground of personal character, or of the authority conferred upon him. Thus, in France, where the legates or nuncios of the Pope were the bearers of powers which were deemed incompatible with the

constitution and laws of the state, it was deemed proper to refuse to receive such agents until their powers were reduced to reasonable limits. Again, the reception of a foreign diplomatic agent has sometimes been refused on the ground of personal character, or known hostility to the sovereign, or the state to which he is sent. Indeed, the sending of a person in a diplomatic capacity, who is known to be odious or objectionable to the court to which he is accredited, if not a direct insult, is certainly far from being an evidence of friendly intentions, or of a desire to maintain friendly relations. But when a diplomatic agent is once received, he is entitled to all the privileges, immunities, and honors annexed by the law of nations to his public character, except where modified by special conditions attached to his reception. (*Wheaton, Elem. Int. Law*, pt. 3, ch. 1, §§ 4, 5; *Bynkershoek, de Foro Legat.*, cap. 11, § 10; *Heffler, Droit International*, § 200; *Moser, Versuch*, b. 3, p. 89; *Merlin, Repertoire*, verb. *Minister Pub.*, sec. 3, § 3; *Klüber, Droit des Gens*, §§ 176, 187; *Horne, On Diplomacy*, sec. 1; *Real, Science du Gouvernement*, tome 5, p. 283; *Wildman, Int. Law*, vol. 1, pp. 83, et seq.)

§ 5. Some governments have established, as a fundamental rule in their diplomatic intercourse with other states, that they will not receive one of their own native subjects as a minister from a foreign power; others again refuse to receive one of their own subjects in any diplomatic capacity, except on condition that he shall be amenable to the local laws and local jurisdiction. Where the reception is refused, it is proper that the motives or grounds of the refusal be alleged; and where conditions are annexed, they must be *expressed* before or at the time of the reception, for, otherwise, the agent is entitled to claim the full rights and honors annexed to the office which he fills. There are no tacit or implied conditions in such receptions which can modify or limit the public character in which he is received, and with which he was accredited by the sovereign state which sent him. (*Wheaton, Elem. Int. Law*, pt. 3, ch. 1, §§ 4, 5; *Wildman, Int. Law*, vol. 1, ch. 3; *Phillimore, On Int. Law*, vol. 2, ch. 3; *Martens, Précis du Droit des Gens*, § 188; *Moser, Beiträge, etc.*, b. 3, pp. 90, et seq.; *Garden, De Diplomatie*, liv. 5, § 2; *Heffler, Droit International*, § 202; *Bynkershoek, De Foro Legat.*, cap. 11, § 10;

*Martens, Manuel Diplomatique*, § 6; *Merlin, Repertoire, verb. Ministre Pub.*, sec. 5, § 7.)

§ 6. The question, with respect to what department of the government belongs the right of sending and receiving diplomatic agents, depends upon the municipal constitution of the state. In monarchical governments, this prerogative usually resides in the sovereign; in republics, it is generally vested in the chief executive, or in the President and his counsel, or the senate, conjointly. In the United States of America, the President alone receives a foreign minister, and the appointment of a minister to a foreign court is made by the President, with the advice and consent of the senate. In monarchical countries, there is also a distinction sometimes made in the rank of the representatives of a foreign state, with respect to the department of government which is to receive them, those of the highest rank being received by the sovereign, and those of a lower grade by the secretary, or minister of foreign affairs. But this subject will be more particularly discussed in another place. (*Wheaton, Elem. Int. Law*, pt. 3, ch. 1, §§ 7, 11, 12; *Wildman, Int. Law*, vol. 1, ch. 3; *Vide post*, chs. ix, x; *Phillimore, On Int. Law*, vol. 2, ch. 2; *Horne, On Diplomacy*, secs. 1, 2; *Merlin, Repertoire, verb. Minister Pub.* sec. 2, § 1.)

§ 7. Many publicists have written at considerable length on the art of diplomacy, and some seem to have based their remarks on the idea that a peculiar tact, finesse, or talent for deception, not required, or even allowed, in other professions, was absolutely necessary to successful negotiation. Indeed, in the diplomacy of the middle ages, it was proclaimed, as a maxim of the art, that "dissimulation must be met by dissimulation, and falsehood by falsehood," and, at even later periods, and in the most refined courts of Europe, bribery, gallantry, and intrigue were regarded as the most effective arguments in the discussion of diplomatic questions. But such disreputable means of negotiation are now seldom resorted to, and the most able diplomatists of the present age are men as much distinguished for their exalted personal character and unimpeachable integrity, as for their talents and learning. While a knowledge of the rules of diplomacy, and of the laws regulating the international rights and duties

of states, are absolutely indispensable in a public minister, it may be remarked, that good manners and good temper seem peculiarly necessary in an officer so intimately connected with the etiquette of polite society and ceremonies of courts. (*Heffler, Droit International*, §§ 228–233; *Flassan, De la Diplomatie*, tome 1, pp. 235, 246, 247; *Maichiavelli, Il Principe*, discorsi 2; *Mably, Droit des Gens*, tome 1, pp. 15, et seq.; *Merlin, Repertoire, verb. Ministre Public*, sec. 3.)

§ 8. The right of a state to negotiate and contract public treaties with other nations, is, like the right of legation, a necessary incident to its sovereignty. This power exists in full vigor in every state which has not parted with this portion of its natural sovereignty, or has not agreed to modify its exercise by some compact with other states. Sovereign and independent states are sometimes restricted in their power to make new treaties by the conditions of alliances already formed with others. Such limitation affects the *exercise* of the power of negotiating treaties, but is not regarded as a modification of the *power* itself. But if, by alliance or otherwise, a state has parted with its general power to negotiate treaties and to contract obligations, it can no longer be regarded as completely sovereign and independent. It has lost one of the essential attributes of sovereignty. (*Wheaton, Elem. Int. Law*, pt. 3, ch. 2, § 1; *Vattel, Droit des Gens*, liv. 2, ch. 12, § 155; *Wildman, Int. Law*, vol. 1, ch. 3; *Vide Ante*, chap. iii; *Phillimore, On Int. Law* vol. 2, § 44; *Bowyer, Universal Public Law*, ch. 20.)

§ 9. Martens admits that, in theory, every sovereign state has a right to form, with other powers, whatever treaties may appear to be conducive to its interests, provided such treaties do not violate the equal rights of others; but, he adds, the general practice of Europe has been very different, many of the smaller states, nominally sovereign and independent, being forced, against their will, to accede to treaties in the formation of which they were not even consulted. He gives a number of examples to prove the truth of his statement. There are, no doubt, numerous instances in the history of Europe where the well established principles of international law have been violated, and many states, *nominally* sovereign and independent, are really mere dependencies of their more



powerful neighbors. But these exceptions do not affect the general rule, and we do not understand them to be stated by Martens with any such object, but rather as instances of the abuse of power. The severe criticisms of Pinheiro-Ferreira on this part of Martens' work, are therefore uncalled for, if not unjust. (*Martens, Precis du Droit des Gens*, § 119; *Pinheiro-Ferreira, Notes sur Martens*, No. 63; *Martens, Recueil des Traités*, tome 5, p. 222; *Vattel, Droit des Gens*, liv. 2, ch. 12, § 155; *Wildman, Int. Law*, vol. 1, ch. 3; *Horne, On Diplomacy*, sec. 1, § 5.)

§ 10. The right of semi-sovereign and dependent states to contract, by treaty, is, like their right of legation, to be determined by the nature of their connection with, or dependence on others. We have already shown that a colony, or ordinary dependency, is a part of a state, but cannot itself be regarded as a distinct political organization, possessing the essential attributes of a state; that the mere fact of dependence, or of feudal vassalage and the payment of tribute, or of occasional obedience, or of habitual influence, does not destroy, although it may greatly impair, the sovereignty of the states so situated. We have also shown the effects of a protectorate, of a confederation, and of a union, upon the sovereignty of the protected, confederated, and united states. The powers of such states to contract, by treaty, will necessarily depend upon the character of the relations thus formed with others. Thus, the sovereign members of the Germanic confederation, could each make treaties of alliance and commerce, not inconsistent with the fundamental laws of the confederation; while in the Swiss confederation, as remodeled by the federal pact of 1815, the diet, consisting of one deputy from each of the twenty-two cantons, had the exclusive power of concluding treaties of peace, alliance and commerce with foreign powers. Again, the several states constituting the United States of America, are expressly prohibited by the federal constitution from entering into any treaty, agreement or compact with foreign powers, without the consent of the federal congress. A foreign power, treating with a semi-sovereign, dependent or confederated state, is bound to know how far such state is capable of contracting obligations by treaty. If it contract with a state incapable

of entering into such engagements, the treaty is necessarily invalid. (*Heffter, Droit International*, §§ 200, et seq.; *Pando, Derecho Internacional*, pt. 3, cap. 1, § 2; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 15; *Wheaton, Elem. Int. Law*, pt. 3, ch. 2, § 1; *Vattel, Droit des Gens*, liv. 2, ch. 12, § 55; *Constitution of the United States*, art. 1, sec. 10; *Story, Com. on the Constitution*, §§ 1347, et seq.)

§ 11. The treaty-making power of a state is determined by its own constitution, or fundamental law. In monarchical governments it is usually vested in the reigning sovereign, sometimes, however, subject to restrictions. In republics it is usually vested in the chief executive, either alone or conjointly with a council or senate. By the constitution of the United States of America, the President has power, by and with the advice and consent of the senate, to make treaties, provided that two-thirds of the senators present concur. This power is general, and, of course, embraces all sorts of treaties, for peace or war. The President has, therefore, no power to terminate a war by a treaty of peace, without the concurrence of two-thirds of the senators present. This, however, does not prevent his entering into a truce with any enemy for the suspension of hostilities. That power results from his office as commander-in-chief of the army and navy of the United States. Military conventions, as shown hereafter, form a part of the *commencia belli*, and do not require the treaty-making power of the state, either for their negotiation or ratification. (*Wheaton, Elm. Int. Law*, pt. 3, ch. 2, § 6; *Story, Com. on the Constitution*, § 1502; *Kent, Com. on Am. Law*, vol. 1, pp. 284, 285; *Heffter, Droit International*, §§ 81, et seq.; *Bello, Derecho Internacional*, pt. 1, cap. 9, § 1; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 15.)

§ 12. The question, how far, under the positive law of nations, ratification by the state in whose name the treaty is made, by its duly authorized minister or diplomatic agent, furnished with full power, is essential to the validity of the treaty, was at one time the subject of much doubt and discussion. But it is now the settled usage to require such ratification, even where this pre-requisite is not reserved by the express terms of the treaty itself. The municipal constitution of the state determines in whom the power of ratifica-

cation resides. By the constitution of the United States of America, treaties are negotiated and concluded under the authority of the President, but the advice and consent of the senate is essential to enable him to pledge the national faith, by making a treaty the supreme law of the land. (*Wheaton, Elem. Int. Law*, pt. 3, ch. 2, § 5; *Vattel, Droit des Gens*, liv. 2, ch. 12, § 156; *Adair, Mission to the Court of Vienna*, p. 54; *Martens, Precis du Droit des Gens*, § 48; *Klüber, Droit des Gens Mod.*, § 48; *Heffter, Droit International*, § 87; *Wildman, Int. Law*, vol. 1, ch. 4; *Garden, De Diplomatie*, liv. 4, sec. 1, § 1; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 15.)

§ 13. There are, however, certain compacts or conventions relating to the pacific intercourse of belligerent nations which may be concluded, not in virtue of any special authority vested by the state in its agents, but in the exercise of a general implied power incidental to their official stations. Such as the official acts of generals and admirals suspending hostilities within the limits of their respective commands, truces, capitulations, cartels for the exchange of prisoners, special licenses to trade, ransom of captured property, etc. Such compacts do not, in general, require the ratification of the supreme power of the state, unless such ratification be expressly reserved in the act itself. These will be more particularly discussed in another place. (*Bello, Derecho Internacional*, pt. 1, cap. 9, § 4; *Wheaton, Elem. Int. Law*, pt. 3, ch. 2, § 3; *Grotius, de Jur. Bel. ac Pac.*, lib. 3, cap. 22, §§ 6-8; *Vattel, Droit des Gens*, liv. 2, ch. 14, § 207; *Polson, Law of Nations*, sec. 5; *Vide Post*, chap. xxvii.)

§ 14. But sometimes compacts or engagements of this kind are made by officers without proper authority, or exceeding the limits of the authority under which they purport to be made, as, for example, a truce for the suspension of arms beyond the limits of the command of the general who makes it. Such acts are called *sponsions*, and must be confirmed by express or tacit ratification to make them binding. The former is given in positive terms and with the usual forms; the latter is implied, from the fact of acting under the agreement as if bound by its stipulations. Mere silence is not sufficient, though good faith requires that the party who refuses its ratification, should notify the other without undue

delay; and if, in the meantime, the ratifying party, acting in good faith upon the supposition of the due authority of the agent, should have totally or partially performed his part of the agreement, he is entitled to be indemnified or replaced in his former position. (*Wheaton, Elem. Int. Law*, pt. 3, ch. 2, § 4; *Grotius, de Jur. Bel. ac Pac.*, lib. 2, cap. 15, § 6; *Vattel, Droit des Gens*, liv. 2, ch. 14, §§ 209–212; *Rutherford, Institutes*, b. 2, ch. 9, § 21; *Polson, Law of Nations*, sec. 5; *Bello, Derecho Internacional*, pt. 1, cap. 9, § 4; *Heffter, Droit International*, § 84.)

§ 15. The question has sometimes been discussed, whether a treaty, duly ratified, is obligatory upon the contracting parties, independently of the auxiliary legislation necessary to carry it into complete effect. This will depend, in a measure, upon the limitations upon the treaty-making power expressed in the constitution, or fundamental laws of the state. A general power to make and ratify treaties, necessarily implies the power to determine the terms upon which they shall be made; but the municipal constitution of a state may have limited this power, by prohibiting it from making engagements of a certain character, without the joint action of the legislative department of the government. This limitation, where not expressed in the fundamental laws of the state, is sometimes necessarily implied in the distribution of powers to its constitutional authorities. Commercial treaties, for example, which have the effect to change the existing laws of trade and navigation of the contracting parties, may require the sanction of the legislative power in each state for their execution. In such cases it is usual to stipulate in the treaty, that it shall not be binding till the proper laws are passed for carrying it into effect. Thus, the commercial treaty of Utrecht, between France and Great Britain, was never carried into effect, the British parliament having rejected the bill which was brought in for the purpose of modifying the existing laws of trade and navigation, so as to adapt them to the stipulations of that treaty. So, also, where an appropriation of money is required by the terms of the treaty, and which can be made only by the legislative power, it may be stipulated in the treaty itself that it shall be held subject to the making of the necessary appropriation for that

purpose. But where the treaty is made, and ratified by competent authority, with no express or implied limitations in the treaty-making power, it is considered obligatory upon the contracting parties, and it is the duty of the legislative power of the state to pass the laws, and to make the appropriations necessary to carry it into complete effect. (*Wheaton, Elem. Int. Law*, pt. 3, ch. 2, § 7; *Gr tius, de Jur. Bel. ac Pac.*, lib. 3, cap. 20, § 7; *Vattel, Droit des Gens*, lib. 1, ch. 20, § 244; *Kent, Com. on Am. Law*, vol. 1, p. 164; *Lord Mahon, Hist. of England*, vol. 1, p. 24.)

 16. By the constitution of the United States, treaties made and ratified by the President, with the advice and consent of the senate, are declared to be "the supreme law of the land," and it seems to be understood that congress is bound to redeem the national faith thus pledged, and to pass the laws necessary to carry their stipulations into effect. It is true that their execution is dependent upon such auxiliary legislation, but it is, nevertheless, the duty of every department of government to assist in performing all the obligations properly incurred by the whole state. This question has been frequently discussed in the legislative halls of congress. It especially came under the consideration of the house of representatives in 1796, with respect to the treaty of 1794 with Great Britain; in 1816, on the commercial convention with the same power; in 1842-3, with respect to the treaty of Washington; and in 1853-4, with respect to the convention with Mexico. In each and every one of these cases the necessary appropriations were made for carrying into effect treaties duly entered into by the President and the senate. If, when a treaty, duly entered into by the President, and ratified by the senate, comes before the house of representatives, that body were to proceed to discuss and examine it as an act of ordinary legislation, and, at its pleasure, grant or refuse the requisite appropriation for carrying it into effect, it would virtually annul the present constitutional provisions with respect to treaties, and make that body a branch of the treaty-making power. (*Wheaton, Elem. Int. Law*, pt. 3, ch. 2, § 7; *Pinkney, Life of, by Wheaton*, pp. 517-549; *Kent, Com. on Am. Law*, vol. 1, p. 285; *Story, On the Constitution*,  1502.)

§ 17. That the omission of congress to pass the necessary acts for carrying a treaty into effect, would be no answer to a foreign government for the non-fulfillment of treaty stipulations, is to be deduced from the ground taken by the United States with France, when the legislative power of the latter state refused to vote the moneys required by the convention of 1831, by which indemnities were provided for the spoliation on American commerce. With respect to this controversy, Mr. Wheaton said: "Neither government has anything to do with the auxiliary legislative measures necessary, on the part of the other state, to give effect to the treaty. The nation is responsible to the government of the other nation for its non-execution, whether the failure to fulfil it proceeds from the omission of one or other of the departments of its government to perform its duty in respect to it. The omission here is on the part of the legislature, but it might have been on the part of the judicial department. The court of cassation might have refused to render some judgment necessary to give effect to the treaty. The king cannot compel the chambers, neither can he compel the courts; but the nation is not the less responsible for the breach of faith thus arising out of the discordant action of the internal machinery of its constitution." (*Wheaton, Elem. Int. Law*, pt. 3, ch. 2, § 7, note; *President's Message*, Dec., 1834; *Annual Register*, 1834, p. 361.)

§ 18. This case is broadly distinguished from that of the convention entered into between Mr. Rush, on the part of the United States, and Mr. Canning, on the part of Great Britain, in 1824, with respect to a mutual right of search of vessels suspected of being engaged in the slave trade. The senate ratified the treaty, with an amendment exempting the coasts of the United States from the *surveillance* of the cruisers of a foreign power. Mr. Canning refused to ratify the treaty as amended, mainly on the ground that the senate could not introduce any change into a treaty negotiated according to the President's instructions. It will probably be admitted, on all hands, at the present day, that Mr. Canning's objection to the action of the senate was without foundation. No treaty is binding till duly ratified, and it was his duty to know that, by the constitution of the United States, that power was vested

in the senate, and the exercise of the power so vested could not be a matter of complaint by a foreign state. If, as in the case of France, in 1881, the convention of March 13th, 1824, had been duly ratified by the treaty-making power of the United States, and either the executive, legislative, or judicial branch of that government had refused or neglected to take the proper measures for carrying it into effect, Mr. Canning would have had good cause of complaint (*Webster, Off. and Dip. Papers*, pref., pp. 18-19; *American State Papers*, 1824; *Holmes, Annals of America*, vol. 2, pp. 506; *Lawrence, On Visitation and Search*, p. 28; *Cong. Doc.*, 18 Cong., 2d Sess., Doc. No. 2; *Hansard, Parl. Debates*, (N. S.) vol. 11, p. 1; *Annual Register*, 1824, p. 119.)

§ 19. How far auxiliary legislation may be necessary to carry into effect the stipulations of treaties, must depend, in a measure, upon the particular constitution of each state. The doctrine of the British constitution, as stated by Blackstone, is, that "whatever contracts the king engages in, no other power in the kingdom can legally delay, resist, or annul." Nevertheless, the treaty binds nobody till its provisions are enacted by law, and a treaty cannot be pleaded in the courts against an act of parliament. In the United States, the constitution declares a treaty to be "the supreme law of the land." It is, therefore, regarded by the courts as equivalent to an act of congress, wherever it operates *propria vigore*, without the necessity of legislative provisions; and, as such, all concerned are bound to obey it, and, within their competence, to execute it. Any law conflicting with a treaty would be declared by our courts as unconstitutional. But when the terms of the stipulation import a contract, and either of the parties engages to perform a particular act, the treaty addresses itself to the political, rather than the judicial, department of the government, and the legislature must execute the contract, before it can become a rule for the court. Congress, though it cannot be compelled by any other branch of the government to pass the law for that purpose, is bound, by the highest moral and political obligations, so to do; and, in point of fact, it has rarely hesitated, and never omitted, to do its duty in this respect. (*Wheaton, Elem. Int. Law*, pt. 3, ch. 2, § 7; *Kent, Com. on Am. Law*, vol. 1, p. 285; *Foster, et al.*, v. *Neilson*, 2

*Peters. Rep.*, p. 314; *United States v. Arredonda*, 6 *Peters. Rep.*, 735; *Blackstone, Commentaries*, vol. 1, p. 257; *Polson, Law of Nations*, sec. 5.)

§ 20. General compacts between nations have been variously divided by text-writers. One of the most important of these divisions is into *personal* and *real* treaties; the first including only treaties of mere personal alliance, such as are expressly made with a view to the person of the reigning sovereign or his family, and the latter relating only to the things of which they treat, without any dependence on the person of the contracting parties. The first bind the state during the existence of the persons referred to, or their public connection with the state, but expire with the natural life or public authority of those who contract them, while the latter bind the contracting parties independently of any change in the constitution or rulers of the state. *Real* treaties include those made for a determinate time, as well as those which are, from their nature, perpetual. (*Wheaton, Elem. Int. Law*, pt. 1, ch. 2, § 11; pt. 3, ch. 2, § 10; *Vattel, Droit des Gens*, liv. 2, ch. 12, §§ 183–197; *Polson, Law of Nations*, sec. 5; *Bello, Derecho Internacional*, pt. 1, cap. 9, § 2; *Heffter, Droit International*, § 82; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 15.)

§ 21. There are numerous other divisions of treaties which have been made with respect to their object or general character, as *equal* and *unequal* treaties; treaties of *guaranty* and *surety*; treaties of *confederation* and *association*; treaties of *alliance* and of *succor* and *subsidy*; treaties of *cession*, of *boundaries*, of *friendship*, of *commerce*, etc. The character and duration of these several kinds of treaties are very different. It not unfrequently happens, however, that the same treaty relates to various things, and that some of its articles are perpetual, while others have reference only to past transactions, or are for a temporary object, and continue only for a determinate time. It is, therefore, necessary to distinguish the character of the engagements, rather than the nature of the things to which they relate. Thus, stipulations with respect to boundaries, cession or exchange of territory, to public debts, to the tenure of property by each others subjects, are permanent in their nature, and, although their operation may, in some cases, be suspended during war, they revive on



the return of peace, unless expressly abrogated or altered, Other stipulations entirely cease on the declaration of war, and require a new treaty to revive them. But this subject will be more particularly discussed in the chapter on the observance and interpretation of treaties. We shall here point out only some prominent distinctions in the general character of treaties. (*Wheaton, Elem. Int. Law*, pt. 3, ch. 2, §§ 9, 10, 11; *Kent, Com. on Am. Law*, vol. 1, p. 175; *Vattel, Droit des Gens*, liv. 3, ch. 10, § 175; *Martens, Precis du Droit des Gens*, § 58; *Bello, Derecho Internacional*, pt. 1, cap. 2, § 2; *Heffter, Droit International*, § 99; *The Society, etc. v. New Haven*, 8 *Wheaton Rep.*, p. 464; *Sutton v. Sutton*, 1 *Russell and Mylne Rep.*, p. 663.)

§ 22. Treaties are sometimes divided by publicists into *equal* and *unequal*. *Equal* treaties are where the contracting parties promise the same or equivalent things; and *unequal* treaties, are where the things promised are neither the same nor equitably proportioned. These different classes of engagements are sometimes spoken of as *bilateral* and *unilateral*. The latter, however, are more properly applied to treaties where promises are made by only one party, without any corresponding engagements, either equal or unequal, by the other. Equal and unequal treaties are to be distinguished from equal and unequal alliances, the latter division having reference to the equality or difference in the rank or dignity of the contracting parties, rather than the character of the engagements entered into. Thus, in treaties of alliance, the treaty may be equal, and the alliance very unequal, and *vice versa*. The inequality in the stipulations, or engagements of a treaty, does not, in general, render such engagements any the less binding upon the contracting parties. (*Vattel, Droit des Gens*, liv. 2, ch. 12, §§ 172–175; *Heffter, Droit International*, §§ 83, 92; *Grotius, de Jur. Bel. ac Pac.*, lib. 2, cap. 16, § 10; *Wildman, International Law*, vol. 1, p. 138; *Puffendorf, Jur. Nat. et Gent.*, lib. 8, cap. 9, § 6; *Heineccius, Elementa de Jur. et Gent.*, lib. 2, §§ 207–211.)

§ 23. Treaties of *guarantee*, and of *surety*, are engagements by which a state promises to aid another against any interruption of certain specified rights, such as boundaries, territory, constitution or form of government, etc. A distinction

is made between guaranty and surety; where the matter relates to things to be done by the party for whom the obligation is contracted, the surety is bound to make good the promise in default of the principal, while the guarantee is only obliged to use his best endeavors to obtain its performance from the principal himself. How far a state may legally contract this class of obligations, must depend first, upon its own constitution, and second, upon the nature of the stipulations with respect to any interference with, or infringement of, the sovereign rights of other independent states. (*Wheaton, Elem. Int. Law*, pt. 3, ch. 2, § 12; *Vattel, Droit des Gens*, liv. 2, ch. 16, §§ 235–239; *Klüber, Droit des Gens Mod.*, §§ 157, 158; *Martens, Precis du Droit des Gens*, § 63; *Flassan, Hist. de la Dip.*, tome 8, p. 195; *Phillimore, On Int. Law*, vol. 2, §§ 56, et seq.)

§ 24. Treaties of *confederation*, and treaties of *association*, not only differ from treaties of general alliance, but are to be distinguished from each other. Treaties of confederation are usually made for the purpose of forming a union, more or less close, in reference to certain specified objects with respect to internal or external matters; as, for instance, the German custom-house confederation, and the American colonial confederation. Treaties of association are usually made for the purpose of war, two or more states associating themselves together for the purpose of carrying on joint operations against a common enemy. Treaties of alliance are, on the contrary, usually entered into for the purpose of common security and general defense, but without reference to any particular power, or to any special event. They may, however, in certain cases, as will be shown hereafter, amount to a *warlike association*. (*Heffler, Droit International*, §§ 91–93; *Puffendorf, de Jur. Nat. et Gent.*, lib. 5, cap. 8, § 3; *Grotius, de Jur. Bel. ac Pac.*, lib. 2, cap. 12, § 24; *Klüber, Precis du Droit des Gens*, § 129.)

§ 25. Treaties of alliance have been subdivided into different classes, such as treaties of *real* and *personal* alliance; of *equal* and *unequal* alliance; of *general* and *special* alliance; of *defensive* and *offensive* alliance, etc. The first two classes have already been described. General and special alliances may be either defensive or offensive, or both. They, how-

ever, differ from each other in their character, and in their effects, with respect to the *casus foederis*, in the event of a war between one of the allies and a third party. General alliances must, also, be distinguished from treaties of limited *succor* and *subsidy*. The latter may have no reference to an eventual engagement in general hostilities, and they do not necessarily render the party furnishing them the enemy of the opposite belligerent. Treaties of alliance may expire by their own limitation, or may be dissolved by the consent of the contracting parties, or by a declaration of war between them. (*Vattel, Droit des Gens*, liv. 2, chs. 12, 13; liv. 3, ch. 6; *Wheaton, Elem. Int. Law*, pt. 3, ch. 2, §§ 13, 14; *Wildman, Int. Law*, vol. 1, ch. 4; *Bello, Derecho Internacional*, pt. 1, cap. 9, § 2; *Heffter, Droit International*, §§ 82, 90.)

§ 26. Among the ancient nations treaties were sometimes entered into, by which the parties simply stipulated to remain *friends*, and to observe toward each other those pacific relations which international law now impose upon all, without the formality of formal engagements, such as the obligations to render justice, to accord satisfaction for injuries, etc. These were called *treaties of amity or friendship*. But, in modern times, this term is usually applied to *treaties of recognition*, which have for their object the admission of a new body politic into the family of nations, or the recognition of a new title assumed by a state, or its ruler, already recognized as sovereign and independent. (*Vattel, Droit des Gens*, liv. 2, ch. 12, § 171; *Heffter, Droit International*, § 92; *Wildman, Int. Law*, vol. 1, p. 138; *Ortolan, Diplomatie de la Mer*, liv. 1, ch. 5.)

§ 27. Treaties of *commerce* are those which regulate the conditions of reciprocal trade, and define and secure the imperfect rights and duties of commercial intercourse. It will be shown hereafter that such treaties usually terminate with a declaration of war between the contracting parties. Treaties of *boundary* and of *cession* are usually of a more permanent character. What particular branch of the government may make these different kinds of treaties, and how, in general, they are to be ratified, when they become obligatory, and when the legislative authority is requisite to carry them into effect, will depend upon the constitution or political

organization of the governments of the contracting parties. The proceedings and formalities requisite for this purpose are not only different in different states, but frequently vary, in the same state, with the character of the treaty and the nature of its stipulations. This subject will be more particularly discussed in other chapters. (*Ortolan, Diplomatie de la Mer*, liv. 1, ch. 5; *Heffter, Droit International*, § 92; *Mably, Droit Pub. de l'Europe*, tome 2, ch. 12; *Klüber, Droit des Gens Mod.*, § 152.)

## CHAPTER IX.

### RIGHTS AND DUTIES OF PUBLIC MINISTERS.

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§ 1. We have already discussed, under the head of legation and treaty, the general rights and duties of a sovereign state with respect to its diplomatic intercourse with others; we will now consider the rights and duties of the various agents which are usually employed for this purpose. As has already

been remarked, the rights of public ambassadors were known and recognized by the classic nations of antiquity, and were, in some degree, though less generally, respected during the middle ages. The increasing interest of different states, in each others affairs, in modern times, growing out of more extensive commercial and political relations, and the vast improvements in the means of intercourse between the citizens of different countries, has rendered expedient and necessary the institution of resident permanent legations at each others courts. "There is no circumstance," says Wheaton, "which marks more distinctly the progress of modern civilization, than the institution of permanent diplomatic missions between different states." The establishment of these permanent legations is generally dated from the peace of Westphalia, in 1648. (*Wheaton, Elem. Int. Law*, pt. 3, ch. 1, § 1; *Vattel, Droit des Gens*, liv. 4, ch. 5, §§ 55–65; *Horne, On Diplomacy*, sec. 1; *Phillimore, On Int. Law*, vol. 2, §§ 148–151, 211–213; *Ward, Hist. Law of Nations*, vol. 2, p. 413; *Heffter, Droit International*, § 199; *Miruss, Des Europ. Gesellschafterecht*, § 89; *Klüber, Europ. Völkerrecht*, § 170; *Wildman, Int. Law*, vol. 1, ch. 3; *Bello, Derecho Internacional*, pt. 3, cap. 1, § 1; *Riquelme, Derecho, Pub. Int.*, lib. 2, cap., Ad. 1.)

§ 2. The primitive law of nations made no distinction between the different classes of public ministers; but the increase in their number and duties, in modern times, has led to numerous distinctions in the name and rank of the different public agents, as well as in the rights which pertain to their respective offices. The distinctions thus introduced into the voluntary law of nations, by the modern usages of Europe and America, have, at times, for the want of exact definition, become the source of serious controversies; but this usage, as modified and explained by conventions and diplomatic discussions, has at last established a more uniform, though not entirely definite, rule on this subject, which has become incorporated into the international code, as a law by which the rights and duties of each may be sufficiently ascertained. (*Wheaton, Elem. Int. Law*, pt. 3, ch. 1, § 6; *Vattel, Droit des Gens*, liv. 4, ch. 6, §§ 69, et seq.; *Klüber, Acten des Wiener Cong.*, 1814 and 1815; *Martens, Precis du Droit des Gens*, §§ 190, et seq.; *Riquelme, Derecho Pub. Int.*, lib. 2, cap.

Ad. 1; *Burlamaqui, Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 15; *Merlin. Répertoire, verb. Ministre Public*, sec. 1; *Wildman, Int. Law*, vol. 1, p. 94; *Grotius, de Jur. Bel. ac Pac.*, lib. 2, cap. 18, § 10; *Bynkershoek, de Foro Legat.*, cap. 6; *Zouch, De Leg. del. Jud.*, p. 139; *Wicquefort, l'Ambassadeur et ses Functions*, lib. 1, §§ 818-838.)

§ 3. The modern classification, as adopted by the congress of Vienna, in 1815, and that of Aix-la-Chapelle, in 1818, and which, with little variation, has been subsequently followed, is based on the power and authority conferred upon the agent by his own government. The first and highest rank is given to those who *represent* the sovereign or state by whom they are delegated; the second rank to *envoys* not invested with the representative character, but who are sent for particular purposes, and have conferred on them special powers; third, to ministers *resident* at a foreign court, not for any specified object, but performing such duties and exercising such powers as their sovereigns may direct or confer on them; fourth, to agents of a rank subordinate to ministers *charged* by their own governments with the performance of certain diplomatic duties in a foreign country. There are, also, connected with nearly every legation, certain secretaries, attachés, messengers, etc., to whom the usage of nations has given certain privileges and exemptions, while in a foreign state. We shall here consider these public officers in a foreign country, in the following order: first, ambassadors; second, envoys and ministers plenipotentiary; third, ministers resident; fourth, *chargés d'affaires*; fifth, secretaries of legation; sixth, attachés and the families of ministers; seventh, messengers, courriers, domestics, servants, etc. (*Heffler, Droit International*, §§ 201, 208; *Wheaton, Elem. Int. Law*, pt. 3, ch. 2, § 6; *Vattel Droit des Gens*, liv. 4, ch. 6, §§ 69, et seq.; *Martens, Précis du Droit des Gens*, liv. 7, ch. 3, § 194; *Horne, On Diplomacy*, sec. 1, § 11; *Phillimore, On Int. Law*, vol. 2, §§ 214, et seq.; *Wildman, Int. Law*, vol. 1, p. 89; *Martens, Guide Diplomatique*, §§ 12, et seq.; *Garden, De Diplomatie*, liv. 5, §§ 3-6; *Bello, Derecho Internacional*, pt. 3, cap. 1, § 4; *Riquelme, Derecho, Pub. Int.*, lib. 2, cap. Ad., 1; *Merlin, Répertoire, verb. Ministre Public*, sec. 1; *Real, Science du Gouvernement*, tome 5, pp. 33-60.)

§4. Every public minister, in some measure, represents the state or sovereign by whom he is sent, as an agent represents his constituent; but an *ambassador* is considered as peculiarly representing the honor and dignity of his principal, and, if the representative of a monarchical government, he has been regarded as entitled to the dignity and exact ceremonial of one representing the person of his sovereign. The terms *ordinary* and *extraordinary*, are applied to designate the time of their intended residence and employment, whether for an indeterminate period, or only for a particular or extraordinary occasion. In Europe, the right of sending ambassadors is considered as exclusively confined to crowned heads, to the great republics, and to other states entitled to royal honors. Papal legates, or nuncios, at catholic courts are usually ranked as ambassadors. (*Wheaton, Elem. Int. Law*, pt. 3, ch. 1, §6; *Vattel, Droit des Gens*, liv. 4, ch. 6, §§70–79; *Martens, Precis du Droit des Gens*, liv. 7, ch. 9, §192; *Martens, Guide Diplomatique*, §§9, 13; *Horne, On Diplomacy*, sec. 1, §9; *Phillimore, On Int. Law*, vol. 2, §§222, et seq.; *Merlin, Repertoire, verb. Ministre Public*, sec. 1; *Bello, Derecho Internacional*, pt. 3, cap. 1, §4; *Heffter, Droit International*, §§201, 208, 220; *Riquelme, Derecho Pub. Int.*, lib. 2, cap. Ad. 1; *Real, Science du Gouvernement*, tome 5, p. 33.)

§5. Envoys, and other public ministers not invested with the peculiar character which is supposed to be derived from representing generally the dignity of the state or the person of the sovereign, come next in rank to ambassadors. They represent their principal only in respect to the particular business committed to their charge at the court to which they are accredited. They are variously named, as envoys, envoys extraordinary, and ministers plenipotentiary, and internuncios of the pope. Martens says: "A distinction is made between the envoy and the envoy extraordinary, and between the envoy extraordinary and the plenipotentiary. But these distinctions have no influence with regard to precedence." (*Martens, Precis du Droit des Gens*, §195; *Riquelme, Derecho Pub. Int.*, lib. 2, caps. Ad., 1, 2; *Real, Science du Gouvernement*, tome 5, p. 42; *Wheaton, Elem. Int. Law*, pt. 3, ch. 1, §6; *Horne, On Diplomacy*, sec. 1, §10; *Phillimore, On Int. Law*, vol. 2, §219; *Martens, Guide Diplomatique*, §§8, 14;



*Hugdorn, Discours sur le Rang., etc.*, § 7; *Garden, De Diplomatie*, liv. 5, §§ 3-6.)

§ 6. In the third class are included ministers, ministers resident, residents, and special ministers charged with a particular business, and accredited to sovereigns. Vattel thus distinguishes between a minister resident, and one called simply minister, and gives us the origin of the name: "The word *resident* formerly only related to the continuance of the minister's stay, and it is frequent in history for ambassadors in ordinary to be styled only residents. But since the establishment of different orders of ministers, the name of resident has been limited to ministers of a third order, to the character of which general practise has annexed a lesser degree of regard. The resident does not represent the prince's person in his dignity, but only his affairs." \* \* "Lastly, a custom still more modern has erected a new kind of ministers, without any particular determination of character. These are called simply *ministers*, to indicate that they are invested with the general quality of a sovereign's mandatories, without any particular assignment of rank and character. It was likewise the punctilio of ceremony which gave rise to this novelty. Use had established distinct treatment for an ambassador, an envoy, and a resident. Difficulties betwixt ministers of the several princes often arose on this head, and especially about rank. In order to avoid all contests on certain critical occasions, when they might be apprehended, it has been judged proper to send ministers, without giving them any of these known characters; such are not subjected to any settled ceremony, and can pretend to no particular treatment. The minister represents his master in a vague and indeterminate manner, which cannot be equal to the first degree, and consequently makes no difficulty in yielding to an ambassador. He is entitled to the general regard of a person of confidence to whom the sovereign commits the care of his affairs, and he has all the rights essential to the character of a public minister." (*Vattel, Droit des Gens*, liv. 4, ch. 6, §§ 73, 74; *Wheaton, Elem. Int. Law*, pt. 3, ch. 1, § 6; *Real, Science du Gouvernement*, tome 5, p. 49; *Horne, On Diplomacy*, sec. 1, § 11; *Martens, Guide Diplomatique*, § 15; *Martens, Precis du Droit des Gens*, § 194; *Garden, De Diplomatie*, liv. 5, §§ 3-6;

*Heffter, Droit International*, § 208; *Riquelme, Derecho Pub. Int.*, lib. 2, cap. Ad. 1.)

§ 7. *Chargés d'affaires*, near the courts of the monarchical governments of Europe, are not accredited to the sovereigns, but to the ministers of foreign affairs. They are divided into two classes, according to the nature and object of their appointments, viz., *chargés d'affaires ad hoc*, who are originally sent and accredited by their governments in that capacity, and *chargés d'affaires par interim*, who are substituted in the place of the minister of their respective nations during his absence. (*Wheaton, Elem. Int. Law*, pt. 3, ch. 1, § 6; *Merlin, Répertoire, verb. Ministre Public*, sec. 1; *Webster, to Am. Chargé d'Affaires at Vienna*, June 8th, 1852; *Horne, On Diplomacy*, sec. 1, § 11; *Maillardiere, Précis du Droit des Gens*, p. 330; *Phillimore, On Int. Law*, vol. 2, § 220; *Kluber, Droit des Gens Mod.*, § 182; *Martens, Précis du Droit des Gens*, § 194; *Martens, Guide Diplomatique*, § 15; *Garden, De Diplomatie*, liv. 5, §§ 3–6; *Heffter, Droit International*, § 208; *Real, Science du Gouvernement*, tome 5, p. 52.)

§ 8. The secretaries of embassy and legation are especially entitled, as official persons, to the privileges of the diplomatic corps, in respect to their exemption from local jurisdiction. "The ambassador's secretary," says Vattel, "is one of his domestics; but the secretary of the embassy has his commission from the sovereign himself, which makes him a kind of public minister, and he, in himself, is protected by the law of nations, and enjoys immunities independent of the ambassador, to whose orders he is indeed but imperfectly subjected, sometimes not at all, and always according to the determination of their common master." (*Vattel, Droit des Gens*, liv. 4, ch. 9 § 122; *Wheaton, Elem. Int. Law*, pt. 3, ch. 1, § 16; *Grotius, de Jur. Bel. ac Pac.*, lib. 2, cap. 18, § 18; *Bynkershoek, de Foro Legat.*, caps. 15, 20; *Martens, Précis du Droit des Gens*, §§ 201, 219; *Foelix, Droit International Privé.*, § 184; *Horne, On Diplomacy*, sec. 4, § 34; *Garden, De Diplomatie*, liv. 5, § 6; *Heffter, Droit International*, §§ 208; *Bello, Derecho Internacional*, pt. 3, cap. 1, § 4; *Riquelme, Derecho Pub. Int.*, lib. 2, caps. Ad. 1, 2; *Real, Science du Gouvernement*, tome 5, p. 54.)

§ 9. The attachés, and the wife and family of a minister, participate in the inviolability attached to his public charac-

ter. "The persons in an ambassador's retinue," says Vattel, "partake of his inviolability; his independency extends to all his household; these persons are so connected with him, that they follow his fate. They depend immediately on him only, and are exempt from the jurisdiction of the country, into which they would not have come, but with this reserve. The ambassador is to protect them, and whenever they are insulted, it is an insult to himself. \* \* \* The ambassador's consort is intimately united to him, and more particularly belongs to him than any other person of his household. Accordingly, she shares his independency, and inviolability; even distinguished honors are paid her, which in some measure could not be denied her without affronting the ambassador. For these, most courts have a fixed ceremonial. The regard due to the ambassador, communicates itself likewise to his children, who also partake of his immunities." This question will be further considered in section thirty-five. (*Vattel, Droit des Gens*, liv. 4, ch. 9, §§ 120, 121; *Martens, Precis, du Droit des Gens*, §§ 219, 234; *Grotius, de Jur. Bel. ac Pac.*, lib. 2, cap. 18, § 8; *Foelix, Droit International Privé*, § 184; *Horne, On Diplomacy*, sec. 4, §§ 35, 36; *Martens, Guide Diplomatique*, §§ 48, 50; *Wicquefort, l'Ambassadeur et ses Fonctions*, liv. 1, § 28; *Garden, De Diplomatie*, liv. 5, §§ 5, 6; *Toucey, Opinions U. S. Att'ys Genl.*, vol. 5, p. 69; *Heffter, Droit International*, § 221; *Riquelme, Derecho Pub. Int.*, lib. 2, cap. Ad., 1, 2; *Merlin, Repertoire, verb. Ministre Public*, sec. 6.)

§ 10. "The practice of nations," says Wheaton, "has also extended the inviolability of public ministers to the messengers and couriers sent with dispatches to or from the legations established in different countries. They are exempt from every species of visitation and search, in passing through the territories of those powers with whom their own government is in amity. For the purpose of giving effect to this exemption, they must be provided with passports from their own government, attesting their official character; and, in case of dispatches sent by sea, the vessel, or *aviso*, must also be provided with a commission or pass. In time of war, a special agreement, by means of a cartel or flag of truce, with passports, not only from their own government, but

from its enemy, is necessary for the purpose of securing these dispatch vessels from interruption, as between the belligerent powers. But an ambassador, or other public minister, resident in a neutral country, for the purpose of preserving the relations of peace and amity between the neutral state and his own government, has a right freely to send his dispatches in a neutral vessel, which cannot lawfully be interrupted by the cruisers of a power at war with his own country." On this subject Vattel very justly remarks: "Couriers sent or received by an ambassador, his papers, letters, and dispatches, all essentially belong to the embassy, and are consequently to be held sacred; since, if they were not respected, the legitimate objects of the embassy could not be attained, nor would the ambassador be able to discharge his functions with the necessary degree of security. The states-general of the United Provinces decided, whilst the president, Jeannin, resided with them as ambassador from France, that, to open the letters of a public minister, is a breach of the law of nations. Other instances may be seen in Wicquefort. That privilege, however, does not, on certain momentous occasions, when the ambassador himself has violated the law of nations by forming or countenancing plots or conspiracies against the state, deprive us of the liberty to seize his papers for the purpose of discovering the whole secret and detecting his accomplices; since, in such an emergency, the ambassador himself may lawfully be arrested and interrogated. An example is furnished us in the conduct of the Roman government, who seized the letters which a treasonable junto had committed to the hands of Tarquin's ambassador. (*Horne, On Diplomacy*, sec. 4, § 37; *Wheaton, Elem. Int. Law*, pt. 3, ch. 1, § 19; *Vattel, Droit des Gens*, liv. 4. ch. 9, § 123; *Martens, Precis du Droit des Gens*, § 250; *The Caroline*, 6 *Rob. Rep.*, p. 466; *The Atalanta*, 6 *Rob. Rep.*, p. 441; *Martens, Guide Diplomatique*, § 51; *Heffter, Droit International*, § 222; *Riquelme, Derecho Pub. Int.*, lib. 2, caps. Ad., 1, 2; *Merlin, Repertoire, verb. Ministre Public*, sec. 6.)

§ 11. The domestics and servants of a minister also participate in the inviolability attached to his public character. "Did not the domestics," says Vattel, "and household of a foreign minister solely depend on him, it is known how very

easily he might be molested and disturbed in the exercise of his functions." But as this exemption of persons of this class sometimes leads to difficulties with the local police, the municipal laws of some states, and the usage of most nations, now require an official list of the domestic servants of foreign ministers to be communicated to the secretary or minister of foreign affairs, in order to entitle them to any of the privileges or exemptions pertaining to them by virtue of their being dependents of a foreign embassy or legation. It was at one time contended that the subjects of the state to which a public minister is accredited, do not participate in his rights of extritoriality, but are justiciable by the tribunals of their country. But the better opinion seems to be that, although such state may very properly prohibit its subjects from becoming the employés or servants of a foreign minister, if it do not so prohibit them, they are, while so employed, to be considered without the limits of its jurisdiction.

It must be observed that the minister himself can afford no "protection;" it is the law which gives a public character to his family, domestics and servants. Hence, a mere appointment by a minister of any person as a member of his household, is, in itself, no protection to such person. It must be shown that he is *bona fide* the officer or servant of such household, and that he performs the duties corresponding to the position or office which he pretends to hold. A court will inquire if his appointment is a fair *bona fide* transaction, and if not, the privilege claimed will not be allowed. The same may be said of the goods of persons claiming such privilege; if they are not *bona fide* members of such household, or are engaged in other business or trade, their goods are not exempt from process for debts, rent, etc. Ministers have not unfrequently attempted to protect the persons and property of their friends from arrest or attachment, or execution, by pretended appointments to positions in their household, but the courts have very properly refused to give any countenance to such frauds. (*Wheaton, Elem. Int. Law*, pt. 3, ch. 1, § 16; *Vattel, Droit des Gens*, liv. 4, ch. 9, § 121; *Grotius, de Jur. Bel. ac Pac.*, lib. 2, cap. 18, § 8; *Bynkershoek, de Foro Legat.*, caps. 15, et seq.; *Martens, Precis du Droit des Gens*, § 219; *Foelix, Droit International Privé*, § 184; *Fontinier*

*v. Heyle*, 3 *Burr. Rep.*, p. 1731; *Lockwood v. Coysgarne*, 3 *Burr. Rep.*, p. 1678; *Delvalle v. Plomer*, 3 *Campbell Rep.*, p. 47; *Heathfield v. Chilton*, 4 *Burr. Rep.*, p. 2016; *Triquet v. Bath*, 3 *Burr. Rep.*, p. 1478; 1 *W. Blackstone Rep.*, 471; *Novello v. Toogood*, 1 *Barn. and Cress. Rep.*, 554; *Martens, Guide Diplomatique*, § 49; *Heffler, Droit International*, § 221; *Merlin, Repertoire, verb. Ministre Public*, sec. 6.)

§ 12. The act of sending a minister by the one, and of receiving him by the other, amounts to a tacit compact between the two states, that he shall be subject only to the authority of his own government. The inviolability of the minister is founded upon mutual utility, growing out of the necessity that such officers and agents should be entirely independent of the local authority, in order to properly fulfil the duties of their mission. \* Hence, the fiction of *ex-territoriality* has been invented, by which the minister, though actually in a foreign country, is considered still to remain within the territory of his own state. He continues subject to the laws of his own country, both with respect to his personal *status*, and his rights of property; and his children, though born in a foreign country, are considered as natives. “A respect due to sovereigns,” says Vattel, “should reflect on their representatives, and chiefly on their ambassadors, as representing their master’s person in the first degree. Whoever affronts or injures a public minister, commits a crime the more deserving a severe punishment, as thereby the sovereign and his country might be brought into great difficulties and trouble. It is just that he should be punished for his fault, and that the state should, at the expense of the delinquent, give a full satisfaction to the sovereign affronted in the person of his minister. If a foreign minister offends a citizen, the latter may oppose him without departing from the respect due to the character, and give him a lesson which shall both efface the stain of the outrage, and expose the author of it. The person offended may further prefer a complaint to his sovereign, who will demand of the minister’s master a just satisfaction. The great concerns of the state forbid the citizen, on such occasions, to entertain those thoughts of revenge which the point of honor might suggest, though otherwise allowable. Even, according to the maxims of the world, a

gentleman receives no disgrace by an affront for which it is not in his power, of himself, to procure satisfaction. The necessity and right of embassies being established, the inviolability of ambassadors and other public ministers is a certain consequence of it; for if their person be not protected from violence of every kind, the right of embassies becomes precarious, and the success very uncertain. A right to the end, is the right to the necessary means. Embassies, then, being of such great importance in the universal society of nations, and so necessary to their common well-being, the person of ministers charged with this embassy is to be *sacred and inviolable* among all nations." (*Vattel, Droit des Gens*, liv. 4, ch. 9, § 81–125; *Wheaton, Elem. Int. Law*, pt. 3, ch. 1, § 14; *Grotius, de Jur. Bel. ac Pac.*, liv. 2, cap. 18, §§ 1–6; *Rutherford, Institutes*, b. 2, ch. 9, § 20; *Wicquefort, de l'Ambas.*, liv. 1, § 27; *Martens, Precis du Droit des Gens.*, §§ 214–218; *Klüber, Droit des Gens Mod.*, pt. 2, tit. 2, § 208; *Foelix, Droit Int. Privé.*, § 209; *Horne, On Diplomacy*, sec. 3, §§ 20–22; *Phillimore, On Int. Law*, vol. 2, §§ 154, et seq.; *Wildman, Int. Law*, vol. 1, chap. 3; *Martens, Guide Diplomatique*, §§ 28, 24; *Garden, De Diplomatie*, liv. 5, § 18; *Riquelme, Derecho Pub. Int.*, lib. 2, cap. Ad., 2; *Burlamaqui, Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 15.)

§ 13. It is proper to distinguish between the *inviolability* of the public minister and the legal fiction of his *ex-territoriality*. The former is not a consequence of the latter, but the latter was invented for the purpose of giving security to the former. The mere fact of a public minister being regarded as a foreigner, resident in a foreign country, would not, of itself, necessarily exempt him from local jurisdiction. Article fourteen of the code Napoleon provides for bringing before the French tribunals *a foreigner resident in a foreign country*, even for engagements contracted *in a foreign country* with a Frenchman. If, therefore, the exemption of the minister depended upon his *ex-territoriality*, or implied foreign residence, he might still be subject to local jurisdiction. The true basis of all diplomatic privilege consists in the idea of *inviolability* which international jurisprudence attaches to his person and his office, and from which it cannot be severed. This idea of *inviolability* is an inherent and essential quality of the

public minister, and the office cannot exist without it. International law has conferred it upon the state or sovereign which he represents, and to divest him of that quality, is to divest him of his office, as the two are inseparable. Not so with respect to the fiction of ex-territoriality. So far as that is not necessary to the exercise of his functions, or, in other words, to secure his inviolability, it is not an essential quality of the public minister, and therefore, may be dispensed with by renouncement or otherwise. It will be seen hereafter, that this distinction, which is made by the best writers on public law, leads to very important results. As a consequence of the sacredness and inviolability of the person of a public minister, he is entitled to an entire exemption from the local jurisdiction, both civil and criminal. This exemption commences the moment he enters the territory of the state to which he is sent, and continues, not only during the whole time of his residence, but until he leaves the country, or at least till he loses his official character, and the protection due to his office. The state to which he is accredited may at any time require him to leave, either before or after his recall by his own government. Sometimes the period within which he must leave is designated in his letter of dismissal; and, at the termination of that period, the protection due to his office necessarily ceases. (*Wheaton, Elem. Int. Law*, pt. 3, ch. 1, § 14; *Phillimore, On Int. Law*, vol. 1, § 219; vol. 2, § 153; *Grotius, de Jur. Bel. ac Pac*, lib. 2, cap. 18, §§ 1–6; *Rutherford, Institutes*, b. 2, ch. 9, § 20; *Wicquefort, de l'Ambassadeur*, liv. 1, § 27; *Vattel, Droit des Gens*, liv. 4, ch. 7, §§ 81–125; *Klüber, Droit des Gens Mod.*, pt. 2, tit. 2, § 203; *Horne, On Diplomacy*, sec. 3, §§ 23–24; *Garden, De Diplomatie*, liv. 5, §§ 19, 20; *Bynkershoek, de Foro Legat.* c. 17–19; *Blackstone, Commentaries*, vol. 1, p. 253; *Wildman, Int. Law*, vol. 1, ch. 8; *Martens, Guide Diplomatique*, §§ 26, 27; *Foelix, Droit Int. Privé*, §§ 169, 188, 210, et seq.; *Heffter, Droit International*, §§ 204, 205, 212–215; *Bello, Derecho Internacional*, pt. 3, cap. 1, § 3; *Riquelme, Derecho Pub. Int.*, lib. 2, cap. Ad., 2; *Merlin, Répertoire, verb. Ministre Public*, sec. 5; *Villefort, Privilèges Diplomatiques*, pp. 7, et seq.)

§ 14. But to this general exemption of a public minister, from the local jurisdiction of the country of his residence,



there are certain exceptions which are well recognized and established in international jurisprudence. These exceptions are: 1st, Where he plots against the safety of the government to which he is accredited; 2d, Where he owes allegiance to the country of his residence, and has been received on condition of renouncing any claim to be exempt from the local jurisdiction.

The first of these can hardly be considered a full exception to the general rule of exemption, for it only authorizes the enforcement of local jurisdiction, and the exercise of local authority, so far as may be necessary for the defense of the state. "In case of offenses," says Wheaton, "committed by public ministers, affecting the existence and safety of the state where they reside, if the danger is urgent, their persons and papers may be seized, and they may be sent out of the country. In all other cases, it appears to be the established usage of nations to request their recall by their own sovereign, which, if unreasonably refused by him, would unquestionably authorize the offended state to send away the offender. There may be other cases which might, under circumstances of sufficient aggravation, warrant the state thus offended, in proceeding against an ambassador as a public enemy, or in inflicting punishment upon his person, if justice should be refused by his sovereign. But the circumstances which would authorize such a proceeding, are hardly capable of precise definition, nor can any general rule be collected, from the examples to be found in the history of nations, where public ministers have thrown off their public character and plotted against the safety of the state to which they are accredited. These anomalous exceptions to the general rule resolve themselves into the paramount right of self-preservation and necessity. Grotius distinguishes here between what may be done in the way of self-defense, and what may be done in the way of punishment. Though the law of nations will not allow an ambassador's life to be taken away as a punishment for a crime after it has been committed, yet this law does not oblige the state to suffer him to use violence without endeavoring to resist it." The weight of authority is, that an ambassador cannot be *punished* by the government to which he is accredited, for plotting against it,

although he may be forcibly resisted, and if necessary, forcibly ejected from the country. (*Wheaton, Elem. Int. Law*, pt. 3, ch. 1, § 15; *Vattel, Droit des Gens*, liv. 4, ch. 7, §§ 94–102; ch. 8, §§ 111–112; *Grotius, de Jur. Bel. ac Pac.*, lib. 2, cap. 18, § 4; *Martens, Precis du Droit des Gens*, §§ 216, 218; *Martens, Guide Diplomatique*, §§ 23–27; *Klüber, Droit des Gens*, pt. 2, tit. 2, § 186; *Ward, Hist. Law of Nations*, vol. 2, pp. 291–334; *Bynkershoek, de Foro Legat.*, caps. 17, 18, 19; *Rutherford, Institutes*, b. 2, ch. 9, § 20; *Merlin, Répertoire, verb. Ministre Public*, sec. 5; *Horne, On Diplomacy*, sec. 3, § 24; *Phillimore, On Int. Law*, vol. 2, § 158; *Wildman, Int. Law*, vol. 1, pp. 103–119; *Fœlix, Droit Int. Privé.*, § 217; *Heffter, Droit International*, §§ 204–215; *Bello, Derecho Internacional*, pt. 3, cap. 1, § 3; *Riquelme, Derecho Pub. Int.*, lib. 2, cap. Ad., § 2; *Burlamaqui, Droit de la Nat. et des Gens.*, tome 5, pt. 4, ch. 15.)

§15. In the second case, that is, where the minister owes allegiance to the country where he resides, and has been received on condition of renouncing any claim to be exempt from the local jurisdiction, a question may arise as to whether such minister is to be considered as really the representative of the country by which he is accredited. And if he is to be regarded as such representative, can the renouncement of his privilege of exemption from local jurisdiction extend to the *inviolability* of his person and office? In other words, must not such renouncement, however general in its terms, be limited to his right of *ex-territoriality*, and with respect to civil jurisdiction only? Would it not be utterly incompatible with his official character, for him to submit to be tried and punished under the local laws as a criminal? But these questions will be more particularly considered in the following paragraphs. The case here supposed is one of theory only, and of little practical importance in modern jurisprudence, as states now never permit their ministers to make any such general renouncement of their diplomatic rights and character. (*Wheaton, Elem. Int. Law*, pt. 3, ch. 1, §§ 5, 15; *Martens, Manuel Diplomatique*, ch. 3, § 23; *Klüber, Droit des Gens Mod.*, § 186; *Bynkershoek, De Foro Legat.*, caps. 11, 22; *Vattel, Droit des Gens*, liv. 4, ch. 8, § 112; *Riquelme, Derecho Pub. Int.*, lib. 1, cap. Ad., § 2; *Heffter, Droit International*, § 42; *Martens, Causes Célèbres*, tome 1, p. 229.)

§ 16. In the third case, that is, where the minister makes a special renouncement of his privilege of exemption and voluntarily submits to the local jurisdiction, several important questions will arise with respect to the manner of making the renouncement, and with respect to the extent of jurisdiction which may be exercised, even where the renouncement is duly made. In the first place, is it sufficient that the minister himself renounces his privileges of exemption, and submits to local jurisdiction, in order to authorize the courts to exercise that jurisdiction; or is it necessary to have the permission of his own government for that purpose? Admitting the necessity of such assent or permission, how is the government to which he is accredited, or its local authorities, to ascertain the fact? Can they go behind the act of the minister to examine his instructions, or to judge between him and his government, as to his authority to act in a matter of this kind? In doing so, would they not assume the character of *Mentor* over the representative of a foreign state? No doubt, the act of the minister must be presumed to have the consent of his government to which alone he is responsible. But this consent being presumed, and the renouncement being within the acknowledged limits of the minister's powers, how is it to be made? Wicquefort is of opinion that a minister who contracts before a notary, (*qui avait contracté par-devant notaire*) thereby renounces his privilege of exemption from local jurisdiction, so far as concerns that particular contract. In the case of the American minister at Berlin, who had entered into a contract of lease for the house in which he resided, the landlord, on his removal at the expiration of the lease, retained the minister's goods as security for alleged damages to the premises, under a general provision of the Prussian civil code, giving him the right to the goods of a tenant, as hypothecated for the payment of the debt. The Prussian government, when appealed to by the American minister, refused to interfere. In the case of M. de Silveira, *conseiller* of the Portuguese legation at Paris, who had been separated from his wife, and had entered into a contract to give her a certain allowance, in which the parties had declared themselves to be domiciled in Paris, and the husband had deposited for this allowance a certain sum in the *Caisse de*

*consignations*;—in a suit by his wife for, among other things, the said alimentary allowance, he pleaded his exemption as diplomatic agent. This title was not contested, and the courts admitted his general exemption from local jurisdiction, but sustained it with respect to the alimentary provision. But neither the opinion of Wicquefort, nor the cases above referred to, are regarded as good authority. The better opinion is, that there must be a special submission to local jurisdiction in the particular case, either directly made, or necessarily implied, by the act of bringing suit as plaintiff, or of consenting to appear as defendant, in a civil action; and certainly, a renouncement of the privilege of exemption must be equally as unequivocal in criminal proceedings. Supposing the renouncement of the diplomatic privilege, and submission to local jurisdiction, to be duly made, we have next to inquire into the *extent* of jurisdiction which is conferred by such acts, and may be lawfully exercised by the local tribunals. We shall consider this question, *first*, with respect to civil suits, and *second*, with respect to criminal matters. (*Vattel, Droit des Gens*, liv. 4, ch. 8, § 111; *Merlin, Répertoire, verb. Ministre Public*, sec. 5; *Villefort, Privilèges Diplomatique*, pp. 10, et seq.; *Gazette des Tribunaux*, Aug. 15th, 1857; *Wheaton, Elem. Int. Law*, pt. 3, ch. 1, §§ 15, 17; *Revue Étrangère et Française*, tome 2, p. 31; *Heffler, Droit International*, § 42; *Bynkershoek, De Foro Legat.*, cap. 23; *Martens, Causes Célèbres*, tome 1, p. 229.)

§ 17. *First*, of civil jurisdiction. Voluntary submission to local civil jurisdiction presents two classes of cases: 1st, Where the minister voluntarily appears as defendant in a civil action and admits jurisdiction; and 2d, Where he appears as plaintiff, and avails himself of the local jurisdiction against another as defendant.

The former class of cases seems, at first sight, to present more difficulties, with respect to *extent* of jurisdiction, than the latter; for, if judgment be given against the minister as defendant, the execution or other process for its satisfaction issued against his property or person, might seriously infringe upon his diplomatic privilege of *inviolability*. But, in fact, the same result might follow in a case where he is plaintiff; for, if he fail in his suit, judgment might be decreed against

tion for costs. Moreover, the defendant may present and successful counter-claims to a larger amount than his demand, and thus obtain judgment for the difference. And again, the opposing party may appeal to a higher tribunal, and thus carry the minister, against his consent, to a higher court. Does the minister, by voluntarily submitting to, or claiming the local jurisdiction, become liable to all the consequences the same as an ordinary litigant? It would certainly be very absurd to allow him to claim it in any particular case, and then to withdraw himself from it whenever such a course suited his interest or convenience. And yet to execute, against him as against an ordinary litigant, the judgment of the court, would seriously compromise the *inviolability* of his diplomatic character. In order to obviate this difficulty, some make a distinction between the judicial proceedings of the court before final judgment, and the supplementary proceedings for the execution of that judgment. "This last theory," says Villefort, "although vague and somewhat arbitrary, is, perhaps, the best in a matter where it may be said more reasonably than in any other, that there is no absolute rule. It, moreover, has the advantage of conforming to the principles laid down by the ancient publicists who founded the science." According to this view, no proceedings by way of execution of judgment can be taken against the person of the minister, or against any of his property which, by the rules of international jurisprudence, is entitled to the privilege of exemption; in other words, although a minister may renounce his right of *ex-territoriality*, he cannot divest himself of the *inviolability* which the law of nations attaches to his person and office.

The following consequences seem to result from this discussion: 1st, If a minister renounces his privilege of exemption, and submits to local jurisdiction by appearing in a civil action, either as plaintiff or defendant, and judgment be rendered against him, he is bound to pay it; 2d, If the judgment be in his favor, and the other party appeal to a higher tribunal, he must submit to the jurisdiction of appeal; 3d, A final judgment against a minister, can only be satisfied out of property which he possesses separate and distinct from his diplomatic character, and no proceedings can be taken

against his person, or against property privileged by the law of nations. (*Wheaton, Elm. Int. Law*, pt. 3, ch. 1, § 15; *Villefort, Privilèges Diplomatiques*, pp. 4–18; *Riquelme, Derecho Pub. Int.*, lib. 2, cap. Ad., § 2; *Wildman, Int. Law*, vol. 1, pp. 98–108; *Heffter, Droit International*, § 42; *Bynkershoek, de Foro Legat.*, cap. 14, § 13; cap. 16, § 2; *Merlin, Répertoire, verb. Ministre Public*, sec. 5; *Vattel, Droit des Gens*, liv. 4, ch. 8, § 111.)

§ 18. *Second*, of criminal jurisdiction. This, also, involves two classes of cases: 1st, Where the minister is charged with crime and submits to be judged by the local tribunals; and 2d, Where he appears in the local tribunals, charging another with crime. The two classes of cases seem, at first sight, to be very different, and yet their result may be nearly the same with respect to the *inviolability* of the minister. A distinction, however, must be drawn in the second class, between the case where the minister appears simply as an informer, to give notice of the commission of a crime by another, and where he appears as a civil party in a criminal prosecution. In the former case, his official character is not involved, for he is no party to the judicial proceedings. But if he appears as a civil party, in a criminal prosecution, he may be seriously compromised. According to French law, if the accusation be declared slanderous, (*calomnieuse*) he is liable to fine and imprisonment. Such a sentence, if attempted to be carried into execution, necessarily affects the *inviolability* of his official character, in the same manner, though in less degree, than where he himself is the original subject of the criminal proceeding. Wheaton, in speaking of the right of a minister to deliver his domestics up for trial, under the laws of the state where he resides, says, he may do this, “as he may renounce any of the privileges to which he is entitled by the public law.” Villefort says this statement is not only incorrect, but entirely unsupported by authorities. Perhaps he mistakes the meaning of Wheaton, by giving too literal a construction to his words. If the latter means to say that a public minister may submit himself to a criminal prosecution, which involves corporal punishment, disgrace or infamy, and still retain his official position as the representative of a foreign state, he is evidently in error, for the two characters are

utterly incompatible. How could the government, to which he is accredited, continue its official intercourse with a man which its tribunals are trying as a criminal under its laws? Again, suppose he be condemned, and the sentence be executed, will it continue to recognize him, when declared infamous, or immured in the walls of a prison? But if Mr. Wheaton means to say that a public minister may renounce his official character, and, having ceased to be the representative of his government, deliver himself up as a private individual, for trial under the laws of the state where he resides, the correctness of the statement will not be disputed. (*Villemor, Privilèges Diplomatiques*, pp. 18-25; *Wheaton, Elem. Int. Law*, pt. 3, ch. 1, §§ 15, 16; *Merlin, Répertoire, verb. Ministre Public*, sec. 5; *Vattel, Droit des Gens*, liv. 4, ch. 8, § 111; *Rayneval, Inst. du Droit de la Nat., etc.*, tome 1, p. 325; *Helie, Traité de l'Instruction Crim.*, tome 2, ch. 4, § 124; *Code Pénal, French, Art.*, 373; *Riquelme, Derecho Pub. Int.*, lib. 2, cap. Ad., § 2; *Wildman, Int. Law*, vol. 1, pp. 103-119; *Heffter, Droit International*, § 42.)

§ 19. As ministers are exempt from the jurisdiction of the tribunals of the country where they reside, whether civil or criminal, the question has often been discussed, how are they to be punished for their offenses, and how are their creditors to obtain justice? The answer is easily deducible from the principles already discussed. The minister is the officer of the state which he represents, and, by the fiction of ex-territoriality, he is considered to be within the limits of his own country. His state is responsible for his acts the same as if committed within its own territory. If he commit an offense upon a citizen of the state where he resides, or refuse to do justice in any of his dealings, the injured party must submit his case to his own government, which will demand satisfaction and redress from the state to which the minister belongs. For offenses against the laws of the country to which he is accredited, the government of that country may not only dismiss the minister and send him out of the country, but may demand justice and punishment of his own country, a refusal of which demand will constitute a sufficient cause for complaint, and, perhaps, for actual hostilities. History furnishes numerous cases of this kind. Thus, the

Bishop of Ross, ambassador of Mary Queen of Scots, was banished from England for conspiring against the sovereign, while the Duke of Norfolk, and other conspiritors, were tried and executed. It is true that the crown lawyers deemed him liable to a *penal action*, but the correctness of their opinion was afterward denied by Albericus Gentilis, Zouch, Sir Robert Cotton, Blackstone, and other eminent English authorities. Mendoza, the Spanish ambassador in England, was ordered, in 1584, to depart the realm, for conspiring to introduce foreign troops and dethrone the queen, and a commissioner was sent to Spain to prefer a complaint against him. Again, in the reign of James I., the Spanish ambassadors, Inoyosa and Colonna, were complained of to the king of Spain for a scandalous libel on the Prince of Wales and Duke of Buckingham, but allowed to depart without trial. In 1654, De Bass, the French minister, was ordered to depart the country in twenty-four hours, on a charge of conspiracy against the life of Cromwell. In 1717, the Swedish ambassador in England, was arrested and his papers seized, on a charge of conspiring against the king. This act was justified solely on the ground of necessity for self-defense. In 1718, the Prince of Cellamare, Spanish ambassador in France, was arrested, and his papers seized, under the same charge, and he was conducted, under a military escort, to the frontier. In neither of these cases was any attempt made to try and punish the minister, nor did any of the ambassadors from other courts complain of an infringement of the privileges of their order, though a protest from this body has always been usual when an injury has been done to any member of it resident at the same court. In the case of Gyllenburg, the Spanish ambassador, Monteleone, simply observed that he was sorry some *other way* than the arrest of an ambassador, and the seizure of his papers, could not have been fallen upon for preserving the peace of the kingdom. In the case of Da Sa, brother of the Portugese ambassador in England, charged, in 1653, with being accessory to a murder, he claimed the privileges of an ambassador; but, on examining his credentials, it was found that he was simply promised a commission at a future time, on the recall of his brother. He was therefore ordered to plead to the indict-



ment. It was generally admitted that if Da Sa had actually been an ambassador, he would not have been liable to trial. At that time the laws of England did not extend, to the suite of a minister, the exemption of the minister himself from the jurisdiction of the courts of the country, in case of murder. It is now, however, generally admitted, that the exemption extends to all the officers and members of his household, and the minister and his government must be held responsible that they be properly punished for any offenses they may commit. (*Vattel, Droit des Gens*, liv. 4, ch. 8, §§ 116; *Grotius, de Jur. Bel. ac Pac.*, lib. 2, cap. 18, § 10; *Phillimore, On Int. Law*, vol. 1, §§ 159-171; *Ward, Hist. Law of Nations*, vol. 2, pp. 486, et seq.; *Bynkershoek, de Foro Legatorum*, caps. 6, et seq.; *Wicquefort, l'Ambassadeur*, liv. 1, § 29; *Martens, Causes Célèbres*, tome 1, pp. 139, et seq.; *Wildman, Int. Law*, vol. 1, pp. 103-119; *Heffler, Droit International*, §§ 204, 212-215; *Riquelme, Derecho Pub. Int.*, lib. 2, cap. Ad., 2; *Merlin, Répertoire, verb. Ministre Public*, sec. 5.)

§ 20. But if the dependents of a foreign minister are exempt from local jurisdiction, who is to punish them for crimes, and for offenses against the local laws? May the minister himself try, and punish them? Or may his state organize a tribunal, in a foreign country, for that purpose? Or may the minister arrest and send them home for that purpose. Or should he discharge them from his service, and deliver them up for trial, under the laws of the state where he resides? These are important questions, upon which there has been some diversity of opinion and practice. In 1603, a man named Combaut, one of the retinue of the Duc de Sully, the French ambassador at London, killed an Englishman at a brothel. Sully tried the offender by a council of Frenchmen, and condemned him to death, after which he delivered him over to the English authorities, for execution. But James I. pardoned the culprit. The French, however, contended, (and, we think, correctly,) that, although King James might refuse to carry the sentence into execution, or might remit the execution in England, yet, as Combaut was a Frenchman, tried and condemned by a French tribunal, the English king had no power to grant him a pardon. The right of the French authorities to try and condemn in England, seems not to

have been questioned. Hotman mentions two cases of the exercise of this power by ambassadors, but does not approve it. One was that of the Spanish ambassador at Venice, who hung one of his servants from the window of his own hotel. The other was that of a French ambassador in England, during the reign of Elizabeth, who executed one of his servants for committing a rape upon a female of his family. In 1657, one of the servants of M. de Thou, the French ambassador in Holland, attempted violence upon a woman in La Haye. He was arrested by a patrol, and taken to the guard-house. The ambassador demanded his release, which was acceded to immediately, and the minister himself inflicted punishment upon the culprit. The Roman ambassadors punished their own dependents, because they were slaves. The earlier writers on international law conceded the same right to modern ambassadors, over the members of their own family and their servants, at least to the extent of irons, imprisonment, and any corporal punishment, short of taking life. Some even contended for their right to punish with death, where that penalty would be imposed by the laws of the minister's own state. But more recent publicists are of opinion that the minister cannot himself try or punish criminal offenses, and that his own government cannot be permitted to organize a tribunal for that purpose, in a foreign state. The minister's house and suite are, for the necessary purposes of his mission, to be regarded as without the territory of the state, but judicial proceedings, and the local punishment of crime, are not the necessary appendages of diplomacy. But may not the minister arrest any member of his suite, and send him home for trial and punishment; and if so, does this power include the sending away subjects of the state in which the minister resides? Where citizens of the state enter the service of a foreign minister, they are to be regarded as emigrants from their own, and as domiciled in a foreign country, and consequently as beyond the jurisdiction and protection of their own government. With respect to the general right to arrest and send home, there seems to be no objection, if no force be used. But the minister has no force of his own for this purpose, nor can he require the foreign state to assist him. Moreover, if the criminal is sent to another country for

trial, much difficulty would generally result in procuring the attendance of witnesses, and in proving the offense or crime, even where jurisdiction could be taken of the case of crime committed within another state. It, therefore, seems to be the preferable mode, as a general rule, where an employé or minister violates the laws of the state in which he resides, to deliver him for trial and punishment by the laws which he has violated. There are exceptional cases, where the minister would be justified in refusing to make such surrender, and in demanding any such person from the local authorities. As already remarked, a minister is held responsible, to a certain extent, for the conduct of his dependents, and if he neglect to provide for their punishment under the laws of his own country, or to dismiss them from his service, and deliver them up to the local tribunals, he is necessarily regarded as either the instigator or defender of the offenses or crimes which they commit. Such a course of conduct, on his part, may constitute a sufficient cause for his dismissal. It was on this ground that the President of the United States, in 1856, revoked the *exequatur* of the British consul at New York. It was not alleged that the consul had himself been guilty of engaging in the enlistment of British troops within the limits of the United States, but that the offense had been committed by his secretary, with his knowledge, and even in his presence, and that he had neither punished nor dismissed his subordinate, nor had he even disavowed the acts of that subordinate. But, as already stated, the secretary of legation, and other functionaries of embassy, are sometimes, in a measure, independent of the minister, and have the right of *inviolability* due to representatives of their own state. In such cases, the minister can neither dismiss them from the legation, nor can he divest them of their diplomatic immunity, so as to render them justiciable by the local tribunals. The government against which the offense is committed, must, therefore, seek its redress from the state by which such diplomatic agents are appointed, and which is to be held responsible for their good conduct. (*Villefort, Privilèges Diplomatique*, pp. 25-31; *Cong. Doc.*, 34th Congress, 1st Sess. H. R., *Ex. Doc. No. 107*; *Rutherford, Institutes*, b. 2, ch. 9, § 20; *Kluber, Droit des Gens Mod.*, §§ 212-214; *Leclerc, Histoire des Provinces Unis*, liv. 1

t. 2, p. 378; *Huber, De Jure Civitatis*, liv. 3, sec. 3, cap. 2; *Rayneval, Institutiones, etc.*, liv. 2, ch. 14, and App. 2; *Hotman, Traité de l'Ambassadeur*, ch. 3, p. 71; *Ward, History Law of Nations*, vol. 2, pp. 486, et seq.; *Horne, On Diplomacy*, sec. 3; *Merlin, Répertoire, verb. Ministre Public*, secs. 5, 6; *Garden, De Diplomatie*, liv. 5, § 21; *Heffter, Droit International*, § 216; *Burlamiqui, Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 15; *Gardner, Institutes*, pp. 498, et seq.; *Vattel, Droit des Gens*, liv. 4, ch. 9, §§ 124, et seq.; *Wheaton, Elem. Int. Law*, pt. 3, ch. 1, § 16; *Bynkershoek, De Foro Legat.*, caps. 15, 20; *Bello, Derecho Internacional*, pt. 8, cap. 1, § 3.)

§ 21 In case of crime committed in the house of a foreign minister, or by one of his suite, and the accused be given up to be tried by the local authorities, as, also, in cases of crime committed by others, it not unfrequently happens that the only or most important witnesses are the minister, his family, his employés, or members of his legation. But if such persons are entirely exempt from local jurisdiction, how can their evidence be taken?—if they refuse to give it, must the guilty escape unpunished? It is true that they cannot be compelled to appear and give testimony in such cases, unless the right of compulsion be secured by treaty stipulations; nevertheless, modern custom has established the practice, that where the deposition of a minister, or of any person attached to his suite, is required in the courts of the country wherein the minister resides, the secretary, or minister of foreign affairs, requests the minister to appear, or to cause the person summoned to appear, before some competent authority, have their depositions taken, and in due form communicated to the authority which made the request. In most cases, the depositions are taken before the secretary of their own legation. In criminal trials, the laws of some countries require that the testimony be given before the court, and in presence of the accused. In such cases, the foreign office requests the personal attendance of the minister, or person summoned, at the time and place designated. To refuse to comply with such request, without good and substantial reasons, is now regarded as discourteous and disrespectful to the government which makes it, and may justify the dismissal of such minister. In 1856, the government of the United States of Amer-

ica requested the recall of the minister of the Netherlands, for having refused to appear before the court, in the city of Washington, to give his testimony in a criminal cause which was then pending, and in which this minister was a most important witness. There may, however, be cases where the minister would be fully justified in declining to accede to such a request. For instance, if the court should be so wanting in dignity and character as to permit its officers and attorneys to annoy witnesses, by unnecessarily prolonged cross-examinations, and by questions irrelevant and insulting to the witness or to his government, a minister would unquestionably be justified in declining to appear himself, or to direct the appearance of any of his suite before such a tribunal. A court which allows such license, with respect to ordinary witnesses, forfeits its own dignity and character; but when it is permitted toward officials of foreign states, it is also guilty of disrespect to such states, and violates the law of international comity. (*Horne, On Diplomacy*, sec. 3, § 25; *Marcy, Letter to American Minister to the Netherlands*, *Cong. Doc*; *Gardner, Institutes*, p. 502.)

§ 22. The independence of a public minister would be very imperfect, if the house in which he lived, and his personal effects or moveables, were not entirely exempt from the local jurisdiction. Otherwise, he might be disturbed under a thousand pretences, his papers searched, his secrets discovered, and his person exposed to insults. Hence, his house is inviolable, and cannot be entered without his permission, by police, custom-house, or excise officers, nor can troops be quartered in it. For the same reasons, his coaches and carriages are usually exempt from all local jurisdiction and examination. But the abuse of this privilege, on the part of ministers, by making their houses an asylum for fugitives from justice, and their carriages a means of effecting the escape of guilty persons, has caused it to be very much restrained by the municipal laws of some countries, sanctioned, in some degree, by the tacit consent of other nations. On this subject, Vattel remarks, that "an ambassador's house, being independent of the ordinary jurisdiction, no magistrate, justices of the peace, or other subordinate officers, are in any case to enter it by their own authority, or to send any

of their instruments, unless it be on an occasion of pressing necessity, where the public welfare is in danger, and which admits of no delay. Whatever concerns a point of such weight and delicacy; whatever affects the right and glory of a sovereign power; whatever may embroil the state with that power, is to be laid immediately before the sovereign, and regulated by himself, or on his orders, by his council of state. Thus, a sovereign is to determine how far the right of asylum, which an ambassador attributes to his house, is to be regarded; and if the delinquent be such that his detention or punishment is of great importance to the state, the prince is not to be withheld by the consideration of a privilege which was never given for the detriment and ruin of states." Thus, when the Duke of Ripparda, in 1726, took shelter in the house of the English ambassador, Lord Harrington, the council of Castile decided that he might be taken out of it, even by force, for, otherwise, what was intended for the benefit of sovereigns would turn to the ruin and destruction of their authority. The Marquis of Fontenay, French ambassador at Rome, sheltered certain Neapolitan exiles and rebels, and attempted to take them out of Rome in his coaches; but the coaches were stopped at the gates and the Neapolitans conveyed to prison. The ambassador sharply complained of this, but the Pope answered him: "That he had given orders for seizing those whose escape the ambassador had favored; that since he took the liberty of protecting villains and criminals of all kinds within the ecclesiastical state, he, who was sovereign, should at least be allowed to lay hold of them again, whenever they could be met with, *as the rights and privileges of ambassadors were not to be carried to such a height.*" In 1747, a Swedish merchant, named Springer, accused of high treason, took refuge in the hotel of the English ambassador at Stockholm. The ambassador at first refused to surrender him; but after the Swedish government had surrounded his house with troops, searched everybody who entered it, and caused his carriage, when he left the hotel, to be followed by a guard, he surrendered Springer, under a protest as to the violence done to his ambassadorial privilege. England demanded reparation, but Sweden steadily refused it, and the ambassadors of

the two governments were mutually withdrawn. Phillimore, the English author, commenting upon this case, says: "It seems clear that the conduct of Sweden was in accordance with the principles of international law." (*Vattel, Droit des Gens*, liv. 4, ch. 9, §§ 118–115; *Martens, Précis du Droit des Gens*, § 217; *Klüber, Droit des Gens Mod.*, pt. 2, tit. 2, ch. 3, § 210; *Toucey, Opinions U. S. Att'ys. Genl.*, vol. 5, p. 70; *Wheaton, Elrn. Int. Law*, pt. 3, ch. 1, § 17; *Horne, On Diplomacy*, sec. 3, §§ 30, 31; *Phillimore, On Int. Law*, vol. 2, §§ 180, 204, 205; *Martens, Guide Diplomatique*, §§ 23–27; *Garden, De Diplomatie*, liv. 5, § 23; *Foelix, Droit Int. Privé*, §§ 211–213; *Heffler, Droit International*, §§ 212, 217; *Bello, Derecho Internacional*, pt. 3, cap. 1, § 3; *Riquelme, Derecho Pub. Int.*, lib. 2, cap. Ad., 2; *Merlin, Répertoire, verb. Ministre Public*, sec. 5.)

§ 23. But the real property of a minister, other than his dwelling situate within the territory of the government to which he is accredited, and the personal property of which he may be possessed, as a merchant, or private person, carrying on trade or other business, or in a fiduciary character as an executor, etc., are not exempt from the operation of the local laws and local jurisdiction. The reason of this is, that the minister does not hold such lands and goods by virtue of his office; they are not annexed to his person so as, like himself, to be reputed out of the territory. Every dispute or suit respecting them, must be carried on in the tribunals of the country, and they are subject to the ordinary process and proceedings of the courts, even of attachment and seizure. But, as already remarked, the house in which he lives, his carriages, furniture and personal property, connected with his embassy, are excepted from the rule. And in suing a minister, or serving other process of a court, in relation to real estate, other than his dwelling, or to personal property which has no relation to the embassy, the minister is summoned and proceeded against in the same manner as an absent person, he being reputed out of the country, and his independence does not permit any immediate address to his person in an authoritative manner, such as sending an officer of a court of justice to him. This question is very clearly discussed by *Vattel*, as follows: "What has no affinity with his (the minister's) functions and character, cannot partake of the privi-

leges derived only from his functions and character. Should, then, a minister, as it has been often seen, engage in trade, all the effects, goods, money, and debts, active and passive, belonging to his commerce, come within the jurisdiction of the country. And though these process cannot be directly addressed to the minister's person, by reason of his independency, he is, by the seizing of the effects belonging to his commerce, indirectly brought to a necessity of answering by such seizure. The abuses arising from a contrary practice are manifest." (*Vattel, Droit des Gens*, liv. 4, ch. 8, §§ 114, 115; *Grotius, de Jur. Bel. ac Pac.*, lib. 2, cap. 18, § 9; *Bynkershoek, de Foro Legat.*, cap. 16, § 6; *Phillimore, On Int. Law*, vol 2, §§ 180, 181; *Miruss, Das Europ. Gesandtschaftsrecht*, § 343; *Klüber, Europ. Volkerrecht*, § 210; *Garden, De Diplomatie*, liv. 5, §§ 18, et seq.; *Martens, Precis du Droit des Gens*, § 217; *Merlin, Répertoire, verb. Ministre Public*, sec. 5; *Foelix, Droit Int. Privé.*, § 216; *Heffter, Droit International*, §§ 215, 217; *Bello, Derecho Internacional*, pt. 3, cap. 1, § 3; *Riquelme, Derecho Pub. Int.*, lib. 2, cap. Ad., 2.)

§ 24. The minister's person, and personal effects, are not liable to assessment and taxation. But his real property, and his movables, (not connected with his mission or embassy) are all subject to taxation, according to the municipal laws of the country. By the usage of most nations, he is exempt from the payment of duties on the importation of articles for his own personal use, and that of his family. But this latter exemption is sometimes limited to a fixed sum per annum, or during the continuance of the mission. The government to which the minister is accredited, and of the country through which he may pass, has a right to adopt and enforce all necessary rules for the protection of its revenue from impositions and fraud, under the guise of importations or exportations, by foreign ministers or their dependents. Hence, goods purporting to be the personal effects of a minister, or for the private use of himself and family, cannot claim a free passage through the custom houses, even where, by usage, they are exempted from duty. Sometimes regular duties are exacted at ports of entry, and the sums so paid are reimbursed to the minister, direct from the national treasury, and, in other cases, the goods are placed under the custom



house seals, and transported to his residence under the direction of custom house officers. The language of Vattel, on this point, is very clear and just. "Among those rights," says he, "that are not necessary to the success of embassies, there are some likewise not founded on a general consent of nations, but which are, nevertheless, by the custom of several countries, annexed to the character. Such is the exemption from the duties of importation and exportation for things which come into a country for a foreign minister, or which he sends out. There is no necessity for him to be distinguished in this respect, since, by paying these duties, he would not be the less able to discharge his functions. If the sovereign is pleased to exempt him from them, it is a civility which the minister could not claim by any right, no more than that his baggage, or any chests, etc., which he sends for from abroad, shall not be searched at the custom house. Thomas Chaloner, the English ambassador in Spain, sent home a bitter complaint to Queen Elizabeth, his mistress, that the custom house officers had opened his trunks in order to search them. But the Queen returned him for answer, *that an ambassador was to put up with everything that did not directly offend the dignity of his sovereign.*" So, while the ambassador is exempt from the capitation tax, and every personal imposition relating to the character or quality of a subject of the state, he is expected to pay tolls, postage, etc., and the ordinary duties imposed on the goods and provisions he may use. (*Vattel, Droit des Gens*, liv. 4, ch. 7, § 105; ch. 9 § 117; *Wheaton, Elem. Int. Law*, pt. 3, ch. 1, § 18; *Martens, Precis du Droit des Gens*, liv. 7, ch. 5, § 220; *Martens, Guide Diplomatique*, §§ 31, 32; *Merlin, Repertoire*, verb. *Ministre Public*, sec. 5; *Horne, On Diplomacy*, sec. 3, § 29; *Phillimore, On Int. Law*, vol. 2, § 202; *Garden, De Diplomatie*, liv. 5, § 22; *Fœlix, Droit Int. Privé*, §§ 211–216; *Heffter, Droit International*, §§ 215, 217; *Bello, Derecho Internacional*, pt. 3, cap. 1, § 3; *Riquelme, Derecho Pub. Int.*, liv. 2, cap. Ad., § 2.)

§ 25. A minister, resident in a foreign country, is entitled to the privilege of religious worship according to the peculiar forms of his own faith, although it may not be generally tolerated by the laws of the state to which he is accredited. But this right is, in strictness, confined to his own residence;

he can do what he pleases within his own walls, and nobody has a right to object or interfere. "But if the sovereign of the country where he resides, has good reasons for not permitting him to exercise his religion in a manner any way public, this sovereign is not to be blamed, much less accused of offending against the law of nations." This limitation, which Vattel has placed on the right of religious worship, is approved by other text-writers, although, at this day, no civilized country refuses ambassadors this free exercise, except so far as it might interfere with municipal police regulations for maintaining public order. "The increasing spirit of religious freedom and liberality," says Wheaton, "has gradually extended this privilege to the establishment, in most countries, of public chapels, attached to the different foreign embassies, in which not only foreigners of the same nation, but even natives of the country of the same religion, are allowed the free exercise of their peculiar worship. This does not, in general, extend to public processions, the use of bells, or other external rights celebrated beyond the walls of the chapel." Privileges of this nature are usually matters of treaty stipulations. (*Wheaton, Elem. Int. Law*, pt. 3, ch. 1, § 21; *Vattel, Droit des Gens*, liv. 4, ch. 7, § 104; *Klüber, Droit des Gens Mod.*, pt. 2, tit. 2, ch. 3. §§ 215–216; *Martens, Precis du Droit des Gens*, §§ 222–226; *Horne, On Diplomacy*, sec. 3, § 32; *Phillimore, On Int. Law*, vol. 2, §§ 207–210; *Martens, Guide Diplomatique*, § 35; *Garden, De Diplomatie*, liv. 5, § 24; *Heffter, Droit International*, § 213; *Bello, Derecho Internacional*, pt. 3, cap. 1, § 3; *Merlin, Repertoire, verb. Ministre Public*, sec. 5.)

§ 26. Every diplomatic agent, in order to be received in that character, and to enjoy the privileges and honors attached to his rank, must be furnished with a *letter of credence*. Such letter usually states the general object of the mission or appointment, the official character of the agent, and requests that full faith and credit may be given to his acts and deeds, as such agent of his government. The execution of this letter depends upon the municipal laws of the state issuing it, and upon the official rank of the agent. In the case of ministers of the first three classes, the letter is usually signed by the sovereign or chief magistrate of the state which

sends them, and is addressed to the sovereign or chief magistrate of the state to which they are delegated. In the case of subordinate agents, it is usually addressed by the minister or secretary of foreign affairs, to the department of foreign affairs of the other government. (*Wheaton, Elem. Int. Law*, pt. 3, ch. 1, § 7; *Martens, Precis du Droit des Gens*, § 202; *Wicquefort, de l'Ambassadeur*, liv. 1, § 15; *Martens, Guide Diplomatique*, § 18; *Horne, On Diplomacy*, sec. 2, § 15; *Phillimore, On Int. Law*, vol. 2, § 229; *Heffter, Droit International*, §§ 200, et seq.; *Bello, Derecho Internacional*, pt. 3, cap. 1, § 5; *Riquelme, Derecho Pub. Int.*, lib. 2, tit. 2, cap. Ad., 1; *Rayneval, Institutions, etc., Appendix No. 2*; *Real, Science du Gouvernement*, tome 5, p. 287.)

§ 27. The *full power* authorizing the minister to negotiate is sometimes inserted in the letter of credence, but it is more usually drawn up in the form of letters patent. In general, ministers sent to a congress or convention of nations, are not furnished with a letter of credence, but with letters patent, or a full power, of which they reciprocally exchange copies with each other on the assembling of the congress. But a *full power* to negotiate does not necessarily bind the state to the treaty which may be signed by the minister under such power. It not unfrequently happens that the power of ratifying or rejecting a treaty, is vested in other authorities than that which conferred the power to negotiate. Thus, in the United States, the power to negotiate is conferred by the President, but no treaty is binding till confirmed by two-thirds of the senate. (*Wheaton, Elem. Int. Law*, pt. 3, ch. 1, § 8; *Martens, Precis du Droit des Gens*, § 204; *Wicquefort, de l'Ambassadeur*, liv. 1, § 16; *Martens, Guide Diplomatique*, § 19; *Horne, On Diplomacy*, sec. 2, § 17; *Phillimore, On Int. Law*, vol. 2, § 230.)

§ 28. The instructions of a minister, from his own government, are for his own direction only, and are not to be communicated to the government or congress to which he is delegated. He cannot be compelled to show them. He, however, may be directed by his own government to communicate them either partially or *in extenso*, or it may be left to his own discretion to communicate them or not, as he may deem expedient. But, without such permission, specially

given, diplomatic instructions are always regarded as confidential communications, with the contents of which the government to which he is credited has no right to be made acquainted. Instances have occurred where ignorant and unskillful ministers have communicated such instructions without authority, to the embarrassment and injury of their own government. (*Wheaton, Elem. Int. Law*, pt. 3, ch. 1, § 9; *Martens, Guide Diplomatique*, § 20; *Horne, On Diplomacy*, sec. 2, § 16; *Wicquefort, l'Ambassadeur*, liv. 1, § 14; *Phillimore, On Int. Law*, vol. 2, § 227; *Garden, De Diplomatie*, liv. 5, § 12; *Bello, Derecho Internacional*, pt. 3, cap. 1, § 5.)

§ 29. It is the duty of every diplomatic agent, on his arrival at his destined post, to notify the government to which he is accredited. In case of a minister of one of the higher classes, he is furnished with a duly authenticated copy of his letter of credence, which is delivered to the minister of foreign affairs, requesting an audience of the sovereign or chief magistrate of the state, for the purpose of delivering the original letter of credence. *Chargés d'affaires*, and other subordinate agents, notify their arrival to the minister of foreign affairs by letter, at the same time requesting an audience of the minister for the purpose of delivering their letters to him. (*Wheaton, Elem. Int. Law*, pt. 3, ch. 1, § 11; *Martens, Guide Diplomatique*, § 42; *Horne, On Diplomacy*, sec. 5, § 39; *Phillimore, On Int. Law*, vol. 2, § 232; *Bello, Derecho Internacional*, pt. 3, cap. 1, § 6; *Heffter, Droit International*, § 218; *Merlin, Repertoire, verb. Ministre Public*, sec. 4.)

§ 30. The ceremony of *solemn entry*, which was formerly practiced with respect to ambassadors and other ministers of the first class, is now usually dispensed with, and they are received in a *private* audience in the same manner as other ministers. On their presentation, by the minister of foreign affairs, they usually deliver their original letter of credence, (which is returned to them,) and pronounce a short complimentary discourse, which is replied to by the sovereign, or chief of the state, to whom they are presented. Such presentation and reception is a sufficient acknowledgement of their official character to enable them to enter on their functions. Each court has its particular ceremonial for the presentation and reception of foreign ministers, which such

ministers conform to as a matter of etiquette. (*Wheaton, Elem. Int. Law*, pt. 3, ch. 1, § 12; *Martens, Guide Diplomatique*, § 42; *Phillimore, On Int. Law.*, vol. 2, § 232; *Horne, On Diplomacy*, sec. 5, § 39; *Garden, De Diplomatie*, liv. 5, §§ 7, 8; *Bello, Derecho Internacional*, pt. 3, cap. 1, § 6; *Heffter, Droit International*, § 218; *Merlin, Repertoire, verb. Ministre Public*, sec. 4.)

§ 31. Although the minister's character is not declared in its whole extent, so as to secure to him the enjoyment of all his rights, till he has had his audience and been acknowledged and admitted by the chief authority of the state to which he is accredited, he is, nevertheless, under the protection of the law of nations from the date of receiving his letter of credence, or official document of appointment. In passing through the country to which he is sent, in order to reach his destined post, he only requires, in time of peace, a passport from his own government, certifying to his official character. But in time of war, he must be provided with a safe conduct, or passport, from the government of the state with which his own country is in hostility, to enable him to travel securely through its territories. A refusal to give such safe conduct is a virtual refusal to receive or admit such ministers. "If they undertake," says Vattel, "to pass privately, and without permission, into places belonging to their master's enemy, they are liable to be arrested; and of this, the last war furnished a signal instance. An ambassador of France, going to Berlin, by the imprudence of his guides, took his way through a village within the electorate of Hanover, of which the sovereign, the king of England, was at war with France. He was arrested, and afterward sent over to England. As his Britanic Majesty had herein only made use of the rights of war, neither the court of France nor that of Prussia, complained of it." (*Vattel, Droit des Gens*, liv. 4, ch. 7, § 85; *Wheaton, Elem. Int. Law*, pt. 3, ch. 1, § 10; *Martens, Guide Diplomatique*, § 22; *Flassan, Hist. Dip. Fran.*, tome 5, p. 246; *Horne, On Diplomacy*, sec. 2, § 19; *Wildman, Int. Law*, vol. 1, p. 119; *Bynkershoek, Foro Legatarum*, cap. 9; *Merlin, Repertoire, verb. Ministre Public*, sec. 5; *Riquelme, Derecho Pub. Int.*, lib. 2, tit 2, cap. Ad., 2; *Real, Science du Gouvernement*, tome 2, p. 297.)

§ 32. In passing through the territory of a friendly state, other than that of the government to which he is accredited, a public minister, or other diplomatic agent, is entitled to the respect and protection due to his official character, though not invested with all the privileges and immunities which he enjoys in the country to whose government he is sent. He has a right of innocent passage through the dominions of all states friendly to his own country, and to the honors and protection which nations reciprocally owe to each other's diplomatic agents, according to the dignity of their rank and official character. If the state through which he purposes to pass has just reason to suspect his object to be unfriendly, or to apprehend that he will abuse this right by inciting its people to insurrection, furnishing intelligence to its enemies, or plotting against the safety of the government, it may very properly, and without just offense, refuse such innocent passage. But if an innocent passage is granted, (and it is always presumed to be by a friendly power, unless specially denied,) he is entitled to respect and protection, and any insult or injury to him is regarded as an insult or injury, both to the state which sends him, and that to which he is sent. The following remarks of Vattel, on the assassination of the French ministers, on the Po, are both appropriate and just. "Francis the First, king of France, had all the reason in the world to complain of the murder of his ambassadors, Rincon and Fregose, as a horrible crime against public faith and the law of nations. These two persons, destined, the one to Constantinople, and the other to Venice, having embarked on the Po, were stopped and murdered, in appearance, by order of the governor of Milan. The negligence of the emperor, Charles V., to discover the author of the murder, gave room to think that he had ordered it, or, at least, that he had tacitly approved of the act. And as he did not give suitable satisfaction concerning it, Francis I. had a very just cause for declaring war against him, and even for demanding the assistance of all other nations. For an affair of this nature is not a particular difference, or a litigious question, in which each party wrests the law over to his side; it is a quarrel of all nations who are concerned to maintain, as sacred, the right and means of communicating together, and treating of

their affairs." In time of general war, or public danger, and when peculiar caution is necessary to be observed in the admission of strangers within a country, although an innocent passage is not often refused to a foreign minister, or other diplomatic agent, yet it is not unusual or improper, in such cases, to restrict it within very narrow limits, by prescribing the particular route he must travel. Thus, at the famous congress of Westphalia, whilst peace was negotiating amidst the dangers of war, and the noise of arms, the routes of the several couriers sent or received by the plenipotentiaries were marked, and out of such limits their passports were of no protection. The Spaniards found similar maxims to prevail even in Mexico and the neighboring countries. The ambassadors were respected all along the road, but if they went out of the highway, they were to forfeit their rights. Such reservations are sometimes necessary to guard against spies being sent into a country, under the guise of diplomatic agents. (*Vattel, Droit des Gens*, liv. 4, ch. 7, §§ 84, 85; *Wheaton, Elem. Int. Law*, pt. 3, ch. 1, § 20; *Martens, Causes Célèbres*, tome 1, p. 310; *Bynkershoek, de Foro Legatorum*, cap. 9; *Phillimore, On Int. Law*, vol. 2, §§ 172-175; *Martens, Guide Diplomatique*, § 23; *Garden, De Diplomatie*, liv. 5, § 26; *Heffter, Droit International*, §§ 204, 212; *Bello, Derecho Internacional*, pt. 3, cap. 1, § 3; *Riquelme, Derecho Pub. Int.*, lib. 2, cap. Ad., 2; *Merlin, Répertoire, verb. Ministre Public*, sec. 5; *Rayneval, Institutions, etc.*, Appen. No. 2; *Wicquefort, de l'Ambassadeur*, liv. 1, § 29; *Grotius, de Jur. Bel. ac Pac.*, lib. 4, cap. 18, § 5; *Miruss, das Europ. Gesandtschaftsrecht*, § 365; *Wildman, Int. Law*, vol. 1, p. 119; *Foelix, Droit Int. Privé.*, § 212.)

§ 33. The public mission of a minister may be terminated in various ways, as, for example, by his death, by the expiration of the period of his appointment, by the termination of the special negotiation or object of the mission, by his recall, by the death of his sovereign, or a radical change in the sovereignty or government of his state, by a change in his diplomatic rank, by his own withdrawal, and termination of his mission, or by his dismissal by the government to which he is accredited. Custom has established particular forms of proceedings applicable to each case, which forms are followed

as a matter of etiquette, rather than of strict right or obligation. When, by any of the circumstances above mentioned, the minister is suspended from his functions, and in whatever manner his mission is terminated, he still remains entitled by courtesy to all the privileges of his public character, until his return to his native country. The time, however, may be limited for such return, at the termination of which his privileges will cease. (*Wheaton, Elem. Int. Law*, pt. 3, ch. 1, § 28; *Martens, Guide Diplomatique*, §§ 59, et seq.; *Vattel, Droit des Gens*, liv. 4, ch. 9, § 126; *Martens, Precis du Droit des Gens*, § 239; *Bello, Derecho Internacional*, pt. 3, cap. 1, § 7; *Heffter, Droit International*, § 223; *Riquelme, Derecho Pub. Int.*, lib. 2, caps. Ad., 1, 2; *Horne, On Diplomacy*, sec. 7; *Real, Science du Gouvernement*, tome 5, p. 287.)

§ 34. Where the mission is terminated by the death of the minister, the secretary of legation, or, if there be no secretary, the minister of some allied or friendly power, places seals upon his effects, takes charge of his body, and makes the arrangements for its interment, or for sending it home. The local authorities do not interfere, unless in case of necessity. All the honors and respect due to the minister while living, are usually paid to his remains; and although, in strictness, the personal privileges of his dependents expire with the termination of his mission by death, the usage of nations extends to the widow, family, and domestics of a deceased minister, for a limited period, the same immunities which they enjoyed during his lifetime. The validity of his testament, and disposition of his movable property, *ab intestato*, must be determined by the laws of his own country, on the principle of the ex-territoriality of his residence. (*Wheaton, Elem. Int. Law*, pt. 3, ch. 1, § 28; *Martens, Guide Diplomatique*, §§ 60–65; *Martens, Precis du Droit des Gens*, § 240; *Horne, On Diplomacy*, sec. 7, §§ 54–57; *Phillimore, On Int. Law*, vol. 2, § 242; *Heffter, Droit International*, § 225; *Moser, Versuch, etc.*, B. 6, pp. 192, 569; *Miruss, das Europ. Gesand.*, etc., §§ 180–182; *Riquelme, Derecho Pub. Int.*, lib. 2, caps. Ad., 1, 2; *Real, Science du Gouvernement*, tome 5, p. 337.)

§ 35. Where the mission is terminated by an ordinary formal letter of recall, nearly the same formalities are observed as on the arrival of the minister at the court to



which he is accredited. He delivers a copy of his letter of recall to the minister or secretary of foreign affairs, and asks an audience of the sovereign or chief executive, for the purpose of taking leave. At this audience he delivers, or exhibits the original of his recall, and takes his leave with a complimentary address suited to the occasion, and to which a complimentary reply is usually made. But if he is recalled at the request of the government to which he is accredited, for misconduct or other objections, he would neither ask nor receive an audience of leave. If recalled on account of a misunderstanding between the two governments, the peculiar circumstances of the case must determine whether a formal letter of recall is to be sent to him, or whether he may quit the residence without waiting for it; whether the minister is to demand, and whether the sovereign is to grant him, an audience of leave. (*Wheaton, Elem. Int. Law*, pt. 3, ch. 1, § 24; *Martens, Guide Diplomatique*, §§ 60–65; *Horne, On Diplomacy*, sec. 7, §§ 52, 53; *Heffler, Droit International*, § 226; *Bello, Derecho Internacional*, pt. 3, cap. 1, § 8; *Riquelme, Derecho Pub. Int.*, lib. 2, caps. Ad., 1, 2; *Real, Science du Gouvernement*, tome 5, p. 337; *Phillimore, On Int. Law*, vol. 2, § 241.)

§ 36. Where the mission is terminated by the expiration of the minister's appointment, as in the case of embassies of mere ceremony, or of special negotiations which have been accomplished or have failed, a formal letter of recall is not usually sent to the minister by his own government. But the formalities of taking leave are nearly the same as in case of an ordinary recall by letter. Where the diplomatic rank of the minister is raised or lowered, as where an envoy becomes an ambassador, or an ambassador has fulfilled his functions as such, and is to remain as a minister of the second or third class, he presents his letter of recall, and a letter of credence in his new character. (*Wheaton, Elem. Int. Law*, pt. 3, ch. 1, §§ 23, 24; *Martens, Guide Diplomatique*, §§ 60–65; *Horne, On Diplomacy*, sec. 7, §§ 52, 53; *Phillimore, On Int. Law*, vol. 2, § 240; *Heffler, Droit International*, § 226; *Bello, Derecho Internacional*, pt. 3, cap. 1, § 8; *Riquelme, Derecho Pub. Int.*, lib. 2, caps. Ad., 1, 2.)

§ 37. Where the mission terminates by the decease or abdication of the minister's own sovereign, or the sovereign

to whom he is accredited, it is usual for him to await a renewal of his letters of credence. In the former case, a mere notification of the continuance of his appointment is sent by the successor of the deceased or deposed sovereign, and in the latter, new letters of credence are sent to the minister to be presented to the new ruler. If a radical change should take place in the character or organization of his own government, it would be the duty of the minister to await new letters of credence, or a ratification of his appointment by the new government. The government, to which he is accredited would be justified in declining any new negotiations with him without such ratification, or new appointment, or, at least, without some evidence of a renewal or continuance of his powers. (*Wheaton, Elem. Int. Law*, pt. 3, ch. 1, § 23; *Martens, Precis du Droit des Gens*, §§ 240–245; *Horne, On Diplomacy*, sec. 7, §§ 52, 53; *Phillimore, On Int. Law*, vol. 2, § 240; *Berrien, Opinions U. S. Att'ys. Genl.*, vol. 2, p. 290; *Heffier, Droit International*, §§ 223–226.)

§ 88. When, on account of the measures of his government, the court at which he resides thinks fit to discontinue all diplomatic intercourse with a minister, this is usually done by a diplomatic note informing him of that fact, and offering him his passport. But when the court, at which he resides, thinks fit to send him away on account of his own misconduct, it is usual to notify his government that he is no longer an acceptable representative, and to request his recall. If the offense be of an aggravated character, he may be dismissed without waiting for a recall by his own government. The government asking such recall, may, or may not, at its own option, state the reasons for the request; they cannot be required. It is sufficient that he is no longer acceptable. In such a case, international courtesy would require his immediate recall. If, however, the request should not be complied with, his dismissal would follow as a matter of course. This is done by a simple notification, and the offer of his passports. The dismissal of a public minister, for personal or official misconduct, is not an act of disrespect or hostility to the government which sent him, and cannot be made a cause of war. No state has a right to send to, or continue at, another court, a minister who is personally

unacceptable to that court; an attempt to do so is, in itself, a mark of disrespect and unfriendliness. If the government, to which a minister is accredited, refuses to receive him, his position is similar to that of one who is recalled or dismissed; that is, he has no ministerial powers, but retains his privileges and the exemptions of his ex-territoriality so long as he remains in the country. But the time of his remaining may be limited to a particular period, after the expiration of which his diplomatic privileges ceases; or if he engage in, or contemplate any act not consonant with the laws, the peace, or the public honor of the country to which he was accredited, the courtesy of transit may be withdrawn. The diplomatic character will not be allowed to be made a cloak for the infringement of international or municipal laws. (*Martens, Guide Diplomatique*, § 59; *Grotius, de Jur. Bel. ac Pac.*, lib. 2, cap 18, § 3; *Wheaton, Elem. Int. Law*, pt. 3, ch. 1, §§ 23-24; *Phillimore, On Int. Law*, vol. 2, § 240; *Garden, de Diplomatie*, liv. 5, § 25; *Cong. Doc.*, 84 Cong., 1st Sess. H. of R., Ex. Doc. No. 107; *Cushing, Opinions of U. S. Att'ys Genl.*, vol. 8, pp. 471, 473; *Bello, Derecho Internacional*, pt. 3, cap. 1, § 7; *Heffter, Droit International*, § 223; *Merlin, Repertoire, verb. Ministre Public*, sec. 5.)

§ 39. All ministers and diplomatic agents, of whatever description, are bound to respect the government and authorities of the country where they reside. Any disrespect, on the part of such officers or agents, are good and sufficient causes for asking their recall; or, in aggravated cases, for dismissing them and sending them out of the country. Such offenses are seldom, if ever, committed by diplomtists of character and experience; but, where a state appoints, as its representatives at foreign courts, men who do not possess the requisite qualifications for the office, it is liable not only to occasional mortifications at the conduct of such agents, but to the risk of being unnecessarily involved in serious international difficulties. Indeed, nations are not unfrequently involved in long and bloody wars, through the faults and unskillfulness of their public ministers and diplomatic agents. (*Bello, Derecho Internacional*, pt. 3, cap. 2, § 1; *Heffter, Droit International*, §§ 206, 207, 232; *Wheaton, Elem. Int. Law*, pt. 3, ch. 1, § 13; *Martens, Guide Diplomatique*, § 52; *Horne, On Diplomacy*, sec. 6, § 42; *Wicquefort, de l'Ambassadeur, etc.*, liv. 1, § 20.)

## CHAPTER X.

### OF CONSULS AND COMMERCIAL AGENTS.

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§ 1. The institution of a foreign consulate originated in the earlier part of the middle ages, in sending officers or persons from one country or city to the sea-ports and towns of foreign

states, for the purpose of protecting the national commerce, especially in matters of shipwreck, and of adjusting disputes between sailors and merchants of their own country. In the absence of regular ambassadors, or other public ministers, these commercial agents sometimes acted in the capacity of representatives and diplomatic agents of their respective states, and not unfrequently assumed and exercised jurisdiction and authority over the merchants and citizens of their own countries in foreign ports and cities. In the ports of the Baltic and Mediterranean, where foreigners were compelled to live in particular quarters of the town, they sometimes exercised great power over their own countrymen, and were designated by various titles, according to the customs of various countries. (*Heffter, Droit International*, § 244; *Phillimore, On Int. Law*, vol. 2, §§ 243, 244; *Miltitz, Manuel des Consuls*, tome 1, p. 6; *Martens, Guide Diplomatique*, §§ 71, 72; *Martens, Precis du Droit des Gens*, §§ 147, 148; *Garden, De Diplomatie*, tome 1, pp. 315, et seq.; *De Clercq, Guide des Consuls*, pp. 1, et seq.; *Bello, Derecho Internacional*, pt. 1, cap. 7, § 1; *Moreuil, Manuel des Agents Con.*, introduction; *Mensch, Manuel du Consulat*, pt. 1; *Riquelme, Derecho Pub. Int.*, lib. 2, cap. Ad., 8; *Dalloz, Repertoire, verb. Consul*, § 1; *Warden, Treatise on Consuls*; *Borel, Functions des Consuls*; *Santos et Barreto, Traité du Consulat*; *Bursotti, Guide des Agents Consulaires*; *De Podio, Jurisdiction des Consuls*.)

§ 2. In the early part of the seventeenth century, a great change was effected in commerce and international intercourse generally, by the establishment of permanent diplomatic agencies and legations, by the general improvement of municipal law, and especially by more clearly defining the boundaries and limits of territorial and foreign jurisdictions. The extra-territorial jurisdiction, criminal and civil, exercised by consuls, was found to be wholly at variance with the recognized principles of public law in christian Europe, and the consular institution, thus changed in its condition and character, was limited to a general vigilance of the consul over the interests of shipping and navigation of his nation at a particular locality. To this was sometimes added a limited authority, over particular questions of dispute, between merchants and sailors of his own country. This is

the general position, which, in christian countries, the consulate continues to occupy at the present day. The duties, and legal status of consuls, as will be shown hereafter, are somewhat different in the east, where, by virtue of express treaty stipulations, they have especial prerogatives and exercise a larger jurisdiction. (*Phillimore, On Int. Law*, vol. 2, §§ 245, 246; *Miltitz, Manuel des Consuls*, tome 3, ch. 1; *Bynkershoek, de Foro Legat.*, lib. 5, cap. 10; *Martens, Precis du Droit des Gens*, §§ 147, 148; *Vattel, Droit des Gens*, liv. 2, ch. 2, § 34; *Martens, Guide Diplomatique*, §§ 71, 72; *Garden, De Diplomatie*, tome 1, pp. 318, et seq.; *De Clercq, Guide des Consuls*, pp. 6, et seq.; *Heffter, Droit International*, §§ 244-247; *Bello, Derecho Internacional*, pt. 1, cap. 7, § 1; *Mareuil, Manuel des Agents Con.*, pt. 1, tit. 1; *Mensch, Manuel du Consulat*, pt. 1, ch. 1.)

§ 3. The consular organization is usually divided into consuls-general, consuls, vice-consuls, and consular or commercial agents. Some states have only the single office of consuls. Consuls-general exercise their functions over several places, and sometimes over a whole country, giving orders and directions to all consuls, vice-consuls, and commercial agents of their government within the same state. English vice-consuls are usually appointed by the consul, subject to the approbation of the foreign secretary of state. Other countries have adopted a different system of appointment. This depends entirely upon the institutions of the particular state, and is not governed by any rule of international jurisprudence. It is sufficient for the state, to which the consular officer is sent, to know that he has been appointed by the proper authority of his own government. By whatever names these officers are designated, their powers and duties, in christian countries, are, generally speaking, the same; these we shall now proceed to discuss under the general name of consul. (*Phillimore, On Int. Law*, vol. 2, § 253; *Flyn, British Consuls Abroad*, p. 6; *Martens, Guide Diplomatique*, §§ 75, 81, 82; *Horne, On Diplomacy*, sec. 1, §§ 13, 14; *Martens, Precis du Droit des Gens*, § 149; *De Clercq, Guide des Consuls*, pp. 27, et seq.; *Bello, Derecho Internacional*, pt. 1, cap. 7, § 1; *Moreuil, Manuel des Agents Con.*, pt. 1, tit. 1; *Mensch, Manuel du Consulat*, pt. 1, ch. 8; *De Cussy, Reg. Consulaires*, pt. 1, sec. 5; *Riquelme, Derecho Pub. Int.*, lib. 2, cap. Ad., 8.)

§ 4. A consul receives a commission from the proper authority of his own government, a duplicate, or properly authenticated copy, being forwarded to the ambassador or minister of the same state, at the court of the country in which the consul is to officiate, in order that he may apply for the usual *exequatur*, to enable him to enter officially upon his consular duties. This is usually issued under the great seal of state, and made public for the information of all concerned. On arriving at his post, the consul usually furnishes the principal public authority of the place with a copy of his commission, stamped with his consular seal. On receiving his *exequatur*, he becomes entitled to exercise the authority, and enjoy the privileges, immunities, and exemptions due and pertaining to his office. Without such *exequatur*, or confirmation of their commission by the sovereign authority of the country to which they are deputed, they cannot enter upon the discharge of their functions; and, on its revocation by such sovereign authority, their official character immediately ceases. (*Bello, Derecho Internacional*, pt. 1, cap. 7, § 1; *Phillimore, On Int. Law*, vol. 2, §§ 246, 258; *Fynn, British Consuls Abroad*, pp. 34-55; *Wildman, Int. Law*, vol. 1, p. 130; *Horne, On Diplomacy*, sec. 1, §§ 13, 14; *Martens, Guide Diplomatique*, § 76; *De Clercq, Guide des Consulats*, pp. 14, et seq.; *Mensch, Guide du Consulat*, pt. 1, ch. 2; *De Cussy, Reg. Consulaires*, pt. 1, sec. 1; *Riquelme, Derecho Pub. Int.*, lib. 2, cap. Ad., 3.)

§ 5. Consuls have neither the representative nor diplomatic character of public ministers. They have no right of extraterritoriality, and therefore cannot claim, either for themselves, their families, houses, or property, the privileges of exemption which, by this fiction of law, are accorded to diplomatic agents who are considered as representing, in a greater or less degree, the sovereignty of the state which appoints them. They, however, are officers of a foreign state, and when recognized as such by the *exequatur* of the state in which they exercise their functions, they are under the special protection of the law of nations. Consuls are sometimes made also *chargés d'affaires*, in which cases they are furnished with credentials, and enjoy diplomatic privileges; but these result only from their character as *chargés*, and not as consuls. (*Wicquefort, de l'Ambassadeur*, liv. 1, § 5; *Martens, Précis du*

*Droit des Gens*, § 148; *Kent, Com. on Am Law*, vol. 1, p. 44; *Fœlix, Droit Int. Privé*, § 218; *Flassan, Hist. de Dip. Française*, tome 1, ch. 9; *Horne, On Diplomacy*, sec. 1, § 13; *Wildman, Int. Law*, vol. 1, p. 180; *Garden, De Diplomatie*, tome 1, pp. 823, et seq.; *Martens, Guide Diplomatique*, §§ 73, 74; *Phillimore, On Int. Law*, vol. 2, § 246; *Wheaton, Elem. Int. Law*, pt. 3, ch. 1, § 22; *Bello, Derecho Internacional*, pt. 1, cap. 7, § 4; *Heffler, Droit International*, § 248; *Westlake, Private Int. Law*, § 139; *Riquelme, Derecho Pub. Int.*, lib. 2, cap. Ad. 3.)

§ 6. Consuls are amenable, generally, to the civil and criminal jurisdiction of the country in which they reside, and their property and effects are subject to the recourse of execution and process of the local courts. It was at one time contended that they should be exempt from criminal jurisdiction, but the position was neither sustained in practice, nor in the doctrines of text-writers. They, therefore, may either be punished for offenses committed by the laws of the state where they reside, or be sent back to their own country, at the discretion of the government which they have offended. A distinction, however, is made between personal offenses and official acts done under the authority and direction of their own government. The latter are matters for diplomatic arrangement between the respective states, and are not properly justiciable by the local courts. Consuls are subject to the payment of taxes, and municipal imposts and duties on their property or trade, and to the municipal charges incident to their personal status, and from which they are not exempted by the privileges of their office. (*Phillimore, On Int. Law*, vol. 2, § 246; *Vattel, Droit des Gens*, liv. 2, ch. 2, § 34; *Kent, Com. on Am. Law*, vol. 1, p. 43; *Wildman, Int. Law*, vol. 1, p. 180; *Bynkershoek, de Foro Legatorum*, c. 10, 13; *Wicquefort, de l'Ambassadeur*, liv. 1, § 5; *Clark v. Cretico*, 1 *Taunton Rep.*, p. 106; *Heffler, Droit International*, § 248; *Bello, Derecho Internacional*, pt. 1, cap. 7, § 4; *Dalloz, Répertoire, verb. Consuls*, § 1; *Westlake, Private Int. Law*, § 139; *Riquelme, Derecho Pub. Int.*, lib. 2, cap. Ad., 3.)

§ 7. Consuls, says Phillimore, "have no claim to any foreign ceremonial or mark of respect, and no right of precedence, except among themselves, according to the rank of the different states to which they belong." But, as already



stated, the present tendency is to consider all sovereign and independent states as equal in rank, with respect to ceremonial and precedence, and consuls of foreign states, of the same rank in the consular hierarchy, should have precedence among themselves, according to the dates of their respective *exequaturs*. The rank which they hold among the officers of their own state, civil or military, is regulated by the laws of their own state, and is not a matter of international jurisprudence, nor does it come within the province of the state where they reside to interfere in any differences between officers of a foreign government, with respect either to relative rank among themselves, or to their authority over each other. (*Heffter, Droit International*, § 248; *Phillimore, On Int. Law*, vol. 2, § 246; *Fynn, British Consuls Abroad*, p. 13; *Martens. Precis du Droit des Gens*, § 149; *Horne, On Diplomacy*, sec. 1, §§ 13, 14; *Martens, Guide Diplomatique*, § 85; *Mensch, Guide du Consulat*, pt. 1, ch. 8.)

§ 8. Although consuls do not enjoy the rights accorded by the law of nations to public ministers, they are, nevertheless, entitled to certain rights of comity, and to certain privileges of exemption from local and political obligations, which cannot be claimed by private individuals,—rights and privileges which are incident to their office, and which result from their character as the duly appointed and recognized officers of a foreign state. Nor are these exemptions limited to the officers themselves; they extend, in a certain degree, to their houses and to public property in their charge. Thus, they may raise the flag, and place the arms of the country they represent over their gates and doors; and, although their houses are liable to domiciliary visit and search, the papers and archives of their consulate are, in general, exempt from seizure or detention, and soldiers cannot be quartered in their consular residence. And, in addition to those rights and privileges to which consuls are entitled by the general rules of international law, custom, in some countries, have added others of the same kind; and, in general, a consul is entitled to all those which have been allowed to his predecessors, unless a formal notice has been given that they will no longer be extended to his office, or to consuls of other states in the country where he resides. To grant privileges and

immunities to consuls of one country, which are not allowed to those of another, may give just cause of complaint. It, however, is necessary to distinguish between what they are absolutely entitled to by the rules of international law, and what is sometimes allowed as a matter of comity, or conceded by treaty stipulations. (*Phillimore, On Int. Law*, vol. 2, §§ 246–248; *Fynn, British Consuls Abroad*, p. 17; *Horne, On Diplomacy*, sec. 1, § 13; *Martens, Guide Diplomatique*, tome 1, § 74; *Garden, De Diplomatie*, tome 1, pp. 323 et seq.; *Heffler, Droit International*, § 248; *Bello, Derecho Internacional*, pt. 1, cap. 3, § 3; *Mensch, Guide du Consulat*, pt. 1, ch. 4; *De Cussy, Reg. Consulaires*, pt. 1, secs. 6, 7; *Riquelme, Derecho Pub. Int.*, lib. 2, cap. Ad., 3.)

§ 9. It is conceded that, so far as the law of nations has established fixed rules with respect to consular exemptions, the subject is withdrawn from the domain of municipal jurisprudence, and the officer may claim all the rights and privileges which are accorded to him by that general and higher code under the protection of which his office is placed. But there has been much difference of opinion among writers on international law, respecting what rights and exemptions are accorded to consuls by that code. This difference of opinion, however, seems to have arisen, in a great degree, from not distinguishing between those which result from the personal *status* of the officer, and those which pertain to the office, and, with respect to the latter, between those which are conceded by treaty or municipal law, and those which are established by the positive law of nations, or the general rules of international comity. In considering their rights and privileges of exemption, consuls may be divided into three distinct classes: first, those of foreign birth sent to a country especially as consuls, who owe no allegiance to the state where they reside, and who hold no property, engage in no business, and have no residence there, other than their official one; second, those of foreign birth and allegiance, who hold property, engage in business, and have a fixed residence in the country; and third, those who are citizens and residents of the country in which they exercise the functions of the consular office, under a foreign government. It is manifest that the rights and privileges of these different classes of persons

must be essentially different, and according to the personal status of each. Nevertheless, all must alike have certain rights and privileges which belong to the office which they hold, and which are independent of the character of the individual incumbent. A neglect of this distinction has led to much of the conflict of opinion among publicists; it must, however, be admitted that there is not an entire uniformity of opinion among those who make the proper distinction between the office and the person. And, indeed, this could hardly be expected, for upon nearly every important question of international law text-writers have held different doctrines. Nevertheless, it is not difficult to deduce from their several reasonings, and the authorities to which they refer, some general and fundamental principle, which will serve to guide us in the determination of a particular case. (*Wicquefort, de l'Ambassadeur*, liv. 1, § 5; *Horne, On Diplomacy*, sec. 1, § 13; *Phillimore, On Int. Law*, vol. 2, §§ 246, 248, 250; *Garden, De Diplomatie*, tome 1, p. 323; *Martens, Guide Diplomatique*, tome 1, § 74; *De Clercq, Guide des Consulats*, liv. 1, ch. 1, § 4; *Heffter, Droit International*, §§ 246, 248; *Mensch, Guide du Consulat*, pt. 1, ch. 4; *Riquelme, Derecho Pub. Int.*, lib. 2, cap. Ad., 3.)

§ 10. There seems to be little or no difficulty in distinguishing between the exemptions of the different classes of foreign consuls who owe no allegiance to the state in which they reside. Those who hold no property, engage in no business, and have no domicil in the country, have the personal exemptions and disabilities of aliens who are mere sojourners. Those who hold real estate, engage in business, and have a fixed residence, are considered as foreigners domiciled in the country, and their consular privileges, or the privileges which pertain to their office, whatever they may be, do not extend to their property or trade so as to change its national character. As neither of these classes owe personal allegiance to the country in which they reside, there can be no conflict between the duties of their allegiance and the duties of their office. But where citizens of the country exercise the functions of foreign consuls, there may be such conflict, and it becomes material to ascertain how far the office which they hold exempts them from the performance

of the political and municipal duties of citizens. It is evident that they can claim none of the exemptions which the other two classes enjoy in virtue of the personal *status* as aliens; but it is believed that they are entitled to those which pertain to their office, and which are necessary for the due performance of its duties. It has been stated, in the preceding chapter, that where a public minister owes allegiance to the state to which he is accredited, such state may refuse to receive him, except on condition of his renouncing any claim to be exempt from local jurisdiction, and that, on making such renouncement, he loses his right of ex-territoriality, but if he be received without conditions, he has the same rights as though he owed no allegiance to the state which receives him. It is true, that consuls have no right of ex-territoriality, but they have certain rights and privileges which pertain to their office and which are accorded to them by the law of nations, just as much as the right of ex-territoriality belongs and is accorded to a public minister. Where a citizen of a state is appointed to a foreign consulate in the state, it is optional with his government to refuse to permit him to hold the office, or to attach conditions to his holding it. But suppose he be recognized as such consul without any conditions. Reason and analogy would lead us to the conclusion that, if no conditions are imposed in the *exequatur*, the citizen who is consul of a foreign state, is entitled, as much as an alien consul, to the privileges and exemptions which necessarily pertain to that office; and it is believed that this conclusion is sustained by the authority of text-writers. The difficulty is to determine what privileges and exemptions properly pertain to the office of consul, or are necessary for the due performance of its duties. (*Vattel, Droit des Gens*, liv. 2, ch. 2, § 34; *Phillimore, On Int. Law*, vol. 2, § 250; *Horne, On Diplomacy*, sec. 1, § 13; *Garden, De Diplomatie*, tome 1, p. 323; *Martens, Guide Diplomatique*, tome 1, § 74; *Heffter, Droit International*, § 248; *Mensch, Guide du Consulat*, pt. 1, ch. 4; *Riquelme, Derecho Pub. Int.*, lib. 2, cap. Ad., 3.)

§ 11. The consulate, as it now exists in christian countries, being of modern origin, and having, in a measure, grown up with the development of commerce, we cannot expect to find, in the older works on international law, any very clear dis-

cussion of the duties and privileges which pertain to the consular office. On this point we must look mainly to the writings of more recent publicists, and even these are very far from satisfactory, the opinions and doctrines which they announce being often conflicting and sometimes totally irreconcilable. Horne says that consuls, whether aliens or subjects of the state in which they reside, "enjoy exemption from taxes and personal services, and their houses are exempt from the burthen of lodging troops." He also says, that citizens cannot accept a consulate of a foreign power without the permission of their own government, but that, having received such permission, they cease, temporarily, to be subjects of the prince in whose territory they reside. This last doctrine is not sustained by the authorities to which he refers, nor is he correct in stating that consuls are exempt from taxes. Mr. Cushing has gone to the opposite extreme, with respect to citizens who hold consulates of foreign states. It is true that his argument has reference only to their liability to do militia and jury duties, but his doctrine is, that they are exempt from no municipal duty, unless exempted by the local laws of their own state. The more correct and reasonable rule, is that laid down by Gardén. He says: "Consuls are under the protection of the law of nations; they, undoubtedly, do not enjoy the rights accorded to envoys; they may be subjects of the state where they reside; they are subject to its jurisdiction, to its police, to imposts; *but they cannot be denied the privileges necessary to the performance of their office.* The consul, therefore, cannot be made liable to civil charges which would prevent him from the performance of his functions." With respect to jury and military duty, their right of exemption depends entirely upon the question, whether such duties would interfere with the due performance of their consular functions. On this point, Baron Charles de Martens, speaking of consuls who do not owe allegiance, hold no real estate, and have no business in the state where they reside, says that they are exempt from service in the civic or municipal guard, and from contributions for that service; and, with respect to those who hold real estate, or engage in trade in the country, or are its subjects and residents, he says they may, if they demand it, be exempted from

personal service in the national guard, although, if necessary, they may be required to provide a substitute. De Clercq says, that consuls are exempt from service in the national guard, when they are citizens of the state which they represent, and that jurisprudence tends to exempt them from it, even when citizens of the state where they reside. The same opinion is expressed by Mensch and others, viz: that consuls must be regarded as exempt from services purely *personal*, which interfere with their *consular* duties. We are of the opinion that jury and militia duty come within the rule of exemption so clearly laid down by Garden. The duties of a jurymen might require the officer to go a considerable distance from his consulate, and prevent him, for days and weeks, from performing the functions of his office. It is still worse with respect to militia duty, and especially in the United States, where militia service in a state would render him liable to be mustered into the service of the general government, and take him a great distance, and for a long time, from his consulate. Certainly this would be an interference with his performing the duties of his office. Again, the same principle which would require him to perform jury and militia duty, would require him to perform the duties of other municipal offices. In many countries the acceptance of such offices is obligatory upon the citizen, and, as their terms are sometimes for years, the performance of their duties would absolutely and totally preclude the performance of the duties of a consulate. Undoubtedly a state may impose these duties upon any and all of its citizens; but if it consents that one of them may hold a foreign consulate, it parts with this right, so far as that citizen is concerned, until it revokes the *exequator* which it has granted. Its right to refuse the *exequator*, in the first instance, or to revoke it at any time afterward, is universally conceded. (*Horne, On Diplomacy*, sec. 1, § 18; *Martens, Guide Diplomatique*, tome 1, § 74; *Garden, De Deplomatie*, tome 1, p. 323; *De Clercq, Guide Pratique*, liv. 1, ch. 1, § 4; *Cushing, Opinions U. S. Att'ys Genl.*, vol. 8, p. 169; *Mensch, Guide du Consulat*, pt. 1, ch. 4; *Riquelme, Derecho Pub. Int.*, lib. 2, cap. Ad., 8.)

§ 12. The federal legislation, on the subject of foreign consuls in the United States, so far as it has gone, accords with

the general spirit of international jurisprudence, as announced by the doctrines of the best writers. The ninth section of article first of the constitution disqualifies a person from holding, at the same time, without the consent of congress, an office under the federal government, and under any foreign prince or state. And the second section of article third, accords to every foreign consul the privilege of being sued in the federal courts; and the ninth section of the judiciary act of 1789, gives to the federal courts *exclusive* jurisdiction of all suits against consuls and vice-consuls, with certain exceptions, enumerated in the act. It has been decided that these privileges comprehend foreign consuls, who are also citizens, and, also, that where a foreign consul is sued jointly with others, it brings his co-defendants within the jurisdiction of the federal courts, by unavoidable implication. The object of this exclusion of the state courts, says the New York court of appeals, is not to exempt a consul from liability to respond to his creditors, or to answer for his misconduct, but to keep within the control of the federal government, and subject to the authority of its courts, all cases and controversies which might in any degree effect our foreign relations. Mr. Cushing argues that, inasmuch as citizens holding foreign consulates are not specially exempted by the constitution, or any act of congress, from service in the militia or on juries, they must be considered liable to such services, unless so exempted by the statutes of the state of the union in which they respectively reside. But this conclusion is too broad; the same course of reasoning would prove the liability of public ministers, and of officers of the federal government, to the same service. He admits, however, that so far as consuls are exempted by the law of nations, or by the rules of international comity, the subject is withdrawn from the domain of municipal jurisprudence. The convention between the United States and France, of February 28d, 1853, places the consuls of the respective countries, so far as this question is concerned, upon a footing conformable to the spirit of international jurisprudence. It stipulates that the consuls of the respective countries shall enjoy "exemption from military billetings, from service in the militia or the national guard, and other duties of the same nature; and from all

direct and personal taxation, whether federal, state or municipal." But if they are citizens of the country where they reside, or become owners of property, or engage in trade there, they are then to be subject to the same taxes and imposts, and, save in matters appertaining to their consular functions, to the same jurisdiction as citizens of the country who are proprietors or merchants. (*Cushing, Opinions U. S. Att'ys Genl.*, vol. 6, p. 409; vol. 8, p. 169; *Constitution of the U. S.*, arts. 1 and 3; *Davis v. Packard*, 7 *Peter's Rep.*, p. 276; *Valarino v. Thompson*, 3 *Selden, Rep.*, p. 577; *Mannhardt v. Soderstrom*, 1 *Binney, Rep.*, p. 138; *U. S. Statutes at Large*, vol. 1, pp. 77, 88, 272; vol. 2, p. 82; vol. 5, p. 394; vol. 10, p. 998.)

§ 13. The duties of consuls are regulated, in a great measure, by the laws of their own country, subject, of course, to the general principles of international jurisprudence. Thus, although, according to the doctrine laid down in the preceding paragraphs, they can exercise no contentious jurisdiction over their fellow countrymen without the express permission of the state in which they reside, they are, nevertheless, allowed a sort of voluntary jurisdiction—a power of arbitration in certain kind of disputes, more especially those relating to matters of commerce. For example, in difficulties between the captain and seamen of a merchant vessel of his own country, the consul may be empowered by his own state to discharge a seaman for cruel treatment or other sufficient cause, and such discharge, though not binding upon the tribunals of the place of his residence, would be so upon those of his own country. The same may be said of commercial disputes between the captain and supercargo, between them and the consignees, or between the consignees themselves. But these special powers of a consul belong rather to the municipal laws of his own state, than to international jurisprudence. (*Phillimore, On Int. Law*, vol. 2, § 249; *Martens, Precis du Droit des Gens*, § 149; *Vattel, Droit des Gens*, liv. 2, ch. 2, § 34; *Horne, On Diplomacy*, sec. 1, § 13; *Wildman, Int. Law*, vol. 1, p. 130; *Martens, Guide Diplomatique*, § 78; *Bello, Derecho Internacional*, pt. 1, cap. 7, § 2; *Heffler, Droit International*, § 247; *Moreuil, Manuel des Agents Con.*, pt. 2, tit. 2; *Mensch, Guide du Consulat*, pt. 1, ch. 9.)



§ 14. As consuls, in christian countries, do not enjoy the privileges of ex-territoriality, and have no jurisdiction over their own countrymen, (unless conceded by treaty,) which is recognized by international law, it follows that all exercise of such jurisdiction, even by consent of parties, produces no effect in foreign tribunals, whatever it may have in those of their own state. Thus, marriages and divorces by consuls, are not valid in international law, nor, as a general rule, even in their own countries, for, as the consul has no ex-territoriality, and is not an officer of the local government, the marriage contract, or its dissolution, is not made by the *lex loci*, either of the country where the parties are, or of that to which they belong. It has, therefore, been held by the Attorney General of the United States, that an American consul, in a christian country, has no power to celebrate marriages between either foreigners or Americans. As will be shown hereafter, a different rule applies to consuls in the east. In proceedings in admiralty, when the courts are adjudicating cases of prize, or other questions of maritime and international right, consuls are permitted to appear in behalf of the interests of their countrymen; so, also, in cases of the administration of estates of their countrymen, or in which their countrymen are interested; but in all such cases they intervene by way of advice, or in the sense of *surveillance*, but not by way of jurisdiction. (*De Clercq, Guide des Consulats*, p. 686; *Miltitz, Des Consulats*, pt. 2, pp. 408, 414, 425; *Santos, Traité du Consulat*, tome 1, p. 21; tome 2, p. 52; *Riquelme, Derecho Pub. Int.*, lib. 2, cap. Ad., 3; *Wheaton, Elem. Int. Law*, pt. 3, ch. 1, § 23, note; *Cushing, Opinions U. S. Atty's Genl.*, vol. 7, p. 18; vol. 8, p. 98; *British Statutes*, 12 and 13 Vic., c. 62; *Kent v. Burgess*, 11 *Simons Rep.*, p. 361.)

§ 15. Consuls are usually allowed to grant passports to subjects of their own country living within the range of their consulates, but not to foreigners. They, however, are usually required to put their *visé* upon the passports of foreigners who embark from the place of their consulate, to go to their (the consuls') country. But this, again, is a matter of local law of their own state. Passports, to be valid, should be given by the proper minister of the country of the person using them, or, at least, by the minister of that country at the court of the state

in which they are to be used; usage has, nevertheless, extended the same effect to passports issued by consuls, within their consular jurisdiction. (*Martens, Guide Diplomatique*, § 78; *Phillimore, On Int. Law*, vol. 2, § 258; *Fynn, British Consul's Handbook*, pp. 36, 55; *Mensch, Guide du Consulat*, pt. 1, ch. 9; *Horne, On Diplomacy*, sec. 1, § 13; *Wildman, Int. Law*, vol. 1, p. 130; *De Clercq, Guide des Consulats*, pp. 610, et seq.)

§ 16. Consuls are frequently required to give certificates relating to matters of fact connected with the commerce of their fellow countrymen, and of merchant vessels of their own state. Such certificates, under seal, receive full faith and credit in the courts of the country where such fact is collaterally called in question. The laws of most states make it the duty of their consuls to take acknowledgment of deeds for the conveyance of real estate, the depositions of witnesses in civil causes, etc.; but the legal effect to be given to such acts must, in general, be determined by municipal law. (*Heffter, Droit International*, § 247; *Phillimore, On Int. Law*, vol. 2, § 258; *Instructions to British Consuls*, 1846, sec. 16; *Horne, On Diplomacy*, sec. 1, § 13; *Wildman, Int. Law*, vol. 1, p. 130; *Martens, Guide Diplomatique*, § 78; *De Clercq, Guide des Consulats*, pp. 619, et seq.)

§ 17. Although within the general duties and rights of consuls to watch over the interests of their own countrymen, it must be remembered that they can afford no protection against due process of the laws of the country where they reside, and any attempt to evade or resist their execution would constitute an offense, for which the offending consul may be dismissed or punished. The only protection he can afford, even to his own countrymen, in such cases, is to see that the laws are properly administered; and if injustice is done to his fellow-countrymen, by depriving them of the ordinary right of trial, or by distinguishing unfavorably between them and citizens of the state where he resides, and to which the tribunals belong, he should make representation to his own government, to whom it belongs to require explanation and satisfaction. He has no diplomatic authority to demand either the one or the other. Nevertheless, by a judicious but firm proceeding, and the exertion of his personal and official influence with the local authorities,

he may do much toward securing the just rights of his countrymen, or in mitigating the severity of their punishment for offenses committed. (*Phillimore, On Int. Law*, vol. 2, § 258; *British Statutes*, 17 and 18 Vic., c. 104; *Horne, On Diplomacy*, sec. 1, § 13; *Martens, Guide Diplomatique*, § 78; *Bello Derecho Internacional*, pt. 1, cap. 7, § 2; *Moreuil, Manuel des Agents Con.*, pt. 3, tit. 2; *Mensch, Guide du Consulat*, pt. 1, ch. 6; *Riquelme, Derecho Pub. Int.*, lib. 2, cap. Ad., 3.)

§ 18. Some states permit, and others forbid, their consuls to trade. As already stated, a consul engaged in trade is, in all that concerns that trade, subject to the local laws, and to the local jurisdiction, in the same way as a native merchant. Their consular character gives them no privileges in trade, either in peace or war. "The character of consul," says Lord Stowell, "does not protect that of a merchant, united in the same person." It is certainly a very objectionable practice to permit consuls to engage in trade, and has so been regarded by the best writers on international law. It necessarily brings them in competition, and not unfrequently in conflict, with the merchants of the place where they reside, and consequently weakens or destroys their official influence. (*Phillimore, On Int. Law*, vol. 2, § 251; *Santos, Traité de Consulat*, pp. 171, 196; *Martens, Guide Diplomatique*, §§ 74, 79; *Bello, Derecho Internacional*, art. 1, cap. 7, § 1; *De Cussy, Reg. Consularies*, pt. 1, sec. 3.)

§ 19. The public character of consul has frequently been the subject of judicial decision in the prize courts and municipal tribunals of France, Great Britain and the United States. The cases of the Marquis de la Fuente Hermosa, decided by the Cour Royale de Paris, in 1842, and that of M. Soller, decided by the Cour Royale de Aix, in 1843, are leading cases in France; those of Barbuil and Cretico, in England. The courts of the United States have generally followed the English decisions on this subject. (*Phillimore, On Int. Law*, vol. 2, §§ 261-271; *Barbuil's Case, Talbot's Cases in Equity*, p. 281; *Clarke v. Cretico*, 3 Burr Rep., p. 1481; *Viveash v. Becker*, 3 Maule and Sel. Rep., p. 297; *The Indian Chief*, 3 Rob. Rep., p. 26; *Arnold v. U. Ins. Co.*, 1 John. Rep., p. 363; *Griswold v. Waddington*, 16 John. Rep., p. 346.)

§ 20. Rights, privileges, and immunities, are sometimes conceded to consuls by treaty stipulations, which they are not entitled to by the general law of nations. Thus, by the convention between France and the United States, in 1853, certain rights of jurisdiction and exemption, not accorded by international law, are given to the consuls of the contracting powers. But such treaty stipulations are binding only upon those who are parties to the agreement. The same may be said of municipal laws, which give special privileges to foreign consuls; they have no effect beyond the limits of the state which passes them, unless specially adopted or permitted by others. (*Wheaton, Elem. Int. Law*, pt. 3, ch. 1, § 22, note; *U. S. Statutes at Large*, vol. 8, p. 230; *Horne, On Diplomacy*, sec. 1, § 14; *Heffter, Droit International*, § 248; *Riquelme, Derecho Pub. Int.*, lib. 2, cap. Ad., 3.)

§ 21. As already remarked, the powers, privileges and immunities of European and American consuls, in Mohammedan and unchristian dominions, are very different from those of consuls in christian countries. This has resulted, in part, from their having there retained the general diplomatic character and prerogatives of jurisdiction, which, in earlier times, they possessed everywhere, and, in part, from the stipulation of treaties. Thus, the Sultans of Turkey have conceded, to the consuls of christian powers, authority to exercise jurisdiction over their fellow-countrymen in Turkey, which, by the general rule of international law of christian states, belongs to the territorial sovereign. Such jurisdiction, both civil and criminal, being conceded to the consuls over their countrymen, to the exclusion of the local magistrates and tribunals, it depends upon the laws of their own states how it shall be exercised, and what penalties or punishments may be imposed or inflicted. In civil cases, this jurisdiction is ordinarily subject to an appeal to the superior tribunals of their own country, and in criminal cases, the prisoners are sometimes sent home for trial and punishment, especially if the punishment exceeds the infliction of pecuniary penalties. This, however, depends upon the laws of their own country regulating such proceedings. (*Wheaton, Elem. Int. Law*, pt. 2, ch. 2, § 11; *Phillimore, On Int. Law*, vol. 2, §§ 272, et seq.; *Martens, Guide Diplomatique*, § 83;

*Horne, On Diplomacy*, sec. 1, § 13; *Wildman, Int. Law*, vol. 1, p. 130; *Garden, De Diplomatie*, tome 1, pp. 327, et seq.; *Cushing, Opinions U. S. Att'ys Genl.* vol. 7, pp. 346-348; *Heffter, Droit International*, § 244; *De Cussy, Reg. Consulaires*, pt. 1, sec. 2, § 9; *Riquelme, Derecho Pub. Int.*, lib. 2, cap. Ad., 3; *Dalloz, Repertoire, verb. Consuls*, § 1.)

§ 22. Mr. Cushing, the United States Attorney General, thus describes the origin of this difference of consular powers in christian and unchristian countries: "I might demonstrate historically what, in this place, it will suffice to affirm, that the institution of consuls, in their present capacity of international agents, originated in the mere fact of difference in law and religion at that period of modern Europe in which it was customary for distinct nationalities, coëxisting under the same general political head, and even in the same city, to maintain each a distinct municipal government. Such municipal colonies, organized by Latin Christians, and especially by those of the Italian republics in the Levant, were administered each by its *consuls*, that is, its proper municipal magistrates of the well known municipal denomination. Their commercial relation to the business of their countrymen was a mere incident of their general municipal authority. Such, also, at the outset, was the nature of their political relation to other coëxisting nationalities around them in the same country, and to that country's own supreme political or military powers. The consuls of christian states, in the countries not christian, still retain unimpaired, and habitually exercise, their primitive function of municipal magistrates for their countrymen, their commercial or international capacity, in those countries, being but a part of their general capacity as the delegated administrative and judicial agents of their nation. This condition of things came to be permanent in the Levant, that is, in Greek Europe and its dependencies, by reason of the tide of Arabic and Tarter conquest having overwhelmed so large a part of the eastern empire, and established the Mohammedan religion there. But the result was different in Latin Europe." This difference, in the powers of consuls in christian and in Mohammedan countries, he says, is founded on the difference of law which necessarily results from the character of the different religions. "The

legislature of Mohammed, for instance, like that of Moses, is inseparable from his religion. We cannot submit to one without undergoing the other. The same legal incompatibility exists, for one reason or another, between us and the unchristian states not Mohammedan." (*Cushing, Opinions of U. S. Att'ys Genl.*, vol. 7, pp. 346–348; *Heffier, Droit International*, § 245; *Moreuil, Manuel des Agents Con.*, introduction; *Riquelme, Derecho Pub. Int.*, lib. 2, cap. Ad., 3; *Dalloz, Repertoire, verb. Consuls*, § 1; *Merlin, Repertoire, verb. Consuls Français*.)

§ 23. The general powers of the consuls of christian nations in Turkey, the Barbary States, and other Mohammedan countries, have been extended, by treaty stipulations, to European and American consuls in the Chinese empire. It was the object of these treaties to exempt foreigners, in China, from the civil and criminal jurisdiction of the local magistrates and tribunals, and make them subject only to the laws and authorities of their own country, thus creating a kind of extraterritoriality for all citizens of the contracting states resident in or visiting any part of the Chinese empire. (*Treaty between U. S. and China*, July 3d, 1844; *Treaty between France and China*, Oct. 24th, 1844; *Treaty between Great Britain and China*, 1842, 1843; *Phillimore, On Int. Law*, vol. 2, § 277; *Moreuil, Manuel des Agents Con.*, Appendice, p. 377; *Riquelme, Derecho Pub. Int.*, lib. 2, cap. Ad., 3; *Gardner, Institutes*, p. 503.)

§ 24. The thirteenth article of the commercial treaty between Great Britain and China, in 1843, is as follows: "Article thirteen. Whenever a British subject has reason to complain of a Chinese, he must first proceed to the consulate and state his grievance. The consul will thereupon inquire into the merits of the case, and do his utmost to arrange it amicably. In like manner, if a Chinese have reason to complain of a British subject, he shall no less listen to his complaint, and endeavor to settle it in a friendly manner. If an English merchant have occasion to address the Chinese authorities, he shall send the address through the consul, who will see that the language is becoming; and, if otherwise, will direct it to be changed, or will refuse to convey the address. If, unfortunately, any disputes take place of such a nature that the consul cannot arrange them amicably, then he shall

request the assistance of a Chinese officer, that they may, together, examine into the merits of the case, and decide it equitably. Regarding the punishment of English criminals, the English government will enact the laws necessary to attain that end, and the consul will be empowered to put them in force; and, regarding the punishment of Chinese criminals, these will be tried and punished by their own laws, in the way provided for by the correspondence which took place at Nankin after the conclusion of peace." (*Annual Register for 1843*, vol. 85, p. 371; *Phillimore, On Int. Law*, vol. 2, § 277; *Chinese Treaties, Hongkong*, 1844, pp. 99, et seq.)

§ 25. With respect to the jurisdiction and judicial powers exercised by British consuls, and other officers, in the east, and in China, the English statute, for carrying this article into effect, is very general in its terms, the details being supplied by orders in council, and instructions from the foreign office. The statute of August 1843, (6 and 7 Vic., c. 94,) enacts: "That it is, and shall be lawful, for Her Majesty to hold, exercise, and enjoy any power or jurisdiction which Her Majesty now hath, or may at any time hereafter have, within any country or place out of Her Majesty's dominions, in the same, and as ample a manner as if Her Majesty had acquired such power or jurisdiction by the cession or conquest of territory. That every act, matter and thing, which may at any time be done in pursuance of any such power or jurisdiction of Her Majesty, in any country or place out of Her Majesty's dominions, shall, in all courts, ecclesiastical and temporal, and elsewhere within Her Majesty's dominions, be, and be deemed and adjudged to be, in all cases, and to all intents and purposes whatsoever, as valid and effectual as though the same had been done according to the local law then in force within such country or place." (*British Statutes*, 6 and 7 Vic., c. 94; *Phillimore, On Int. Law*, vol. 2, § 275.)

§ 26. In consequence of the provisions of this statute, two important orders in council were issued, respecting the civil and criminal jurisdiction of Her Majesty's consuls in the Levant, and the foreign office put forth a memorandum, for the guidance of the consuls in the exercise of such jurisdic-

tion, and clearly stating the grounds upon which it rests. It says that, as this right of jurisdiction is an exception to the system universally observed among christian nations, and is derived solely from concessions made by the territorial sovereignty, it "is strictly limited to the terms in which the concession is made;" that, in the next place, it depends "on the extent to which the Queen, in the exercise of the power vested in her majesty by act of parliament, may be pleased to grant to any of her consular servants authority to exercise jurisdiction over British subjects, and, therefore, the orders in council, which may, from time to time, be issued, are the only warrants for the proceedings of the consuls, and exhibit the rules to which they must scrupulously adhere." (*Phillimore, On Int. Law*, vol. 2, § 276; *Fynn, British Consuls Abroad*, pp. 174-8; *Annual Register*, vol. 85, p. 870; *Martens, Nouv. Recueil de Traités*, pp. 418, 484; *Orders in Council*, Oct. 2d, 1843, and June 19th, 1844.)

§ 27. The articles of the treaty entered into, in 1844, between France and China, relating to this subject, are as follows: "XXV. Lorsqu' un citoyen Français, aura quelque sujet de plainte ou quelque réclamation à formuler contre un Chinois, il devra d'abord exposer ses griefs au consul, qui après avoir examiné l'affaire, s'efforcera de l'arranger amicalement. De même, quand un Chinois aura à se plaindre d'un Français, le consul écouterà sa réclamation avec intérêt, et cherchera à ménager un arrangement amiable. Mais si, dans l'un au l'autre cas, la chose était impossible, le consul requerra l'assistance du fonctionnaire Chinois compétent, et tous deux, après avoir examiné conjointement l'affaire, statueront suivant l'équité. XXVI. Si dorénavant des citoyen Français, dans un des cinq ports, éprouvaient quelque dommage, ou s'ils étaient l'objet de quelque insulte ou vexation de la part de sujets Chinois, ceux-ci seront poursuivis par l'autorité locale, qui prendra les mesures nécessaires pour la défense et la protection des Français. A bien plus forte raison, si des malfaiteurs, ou quelque partie égarée de la population, tentaient de piller, de détruire ou d'incendier les maisons, les magasins des Français, ou tout autre établissement formé par eux, la même autorité, soit à la réquisition du Consul, soit de son propre mouvement, enverrait en toute hâte la force armée



pour dissiper l'émeute, s'emparer des coupables et les livrer à toute la sévérité des lois; le tout sans préjudice des poursuites à exercer par qui de droit pour indemnisation des pertes éprouvées. XXVII. Si malheureusement il s'élevait quelque rixe ou quelque querelle entre des Français et des Chinois, comme aussi dans le cas où durant le cours d'une semblable querelle, un ou plusieurs individus serriert tués ou blessés, soit par des coups de fer, soit autrement, les Chinois seront arrêtés par l'autorité Chinoise qui se chargera de les faire examiner et punir, s'il y a lieu, conformément aux lois du pays. Quant aux Français, ils seront arrêtés à la diligence du consul, et celui-ci prendre tout les mesures nécessaires pour que les prévenues soient livrés à l'action régulière des lois Françaises, dans la forme et suivant les dispositions qui seront ultérieurement déterminées par la gouvernement Français. In en sera de même en toute circonstance analogue et non prévue dans la présente convention, le principe étant que, pour la répression des crimes et délits commis par eux dans les cinq ports, les Français seront constamment régis par la loi Française. XXVIII. Les Français qui se trouveront dans les cinq ports dépendent également pour toutes les difficultés ou les contestations qui pourraient s'élever entre eux, de la juridiction Française. En cas de différends survenus entres Français et étrangers, il est bien stipulé que l'autorité Chinois n'aura à s'en mêler d'aucune manière. Elle n'aura pareillement à exercer aucune action sur les navires marchands Français; ceux-ci ne relèveront que de l'autorité Française et du capitaine." (*De Clercq, Formulaire des Chancelleries*, tome 2, p. 369; *Chinese Treaties, Hongkong*, 1844, pp. 80-82; *Moreuil, Manuel des Agents Cons.*, p. 239.)

§ 28. De Clercq, writing in 1851, says: that no special laws or regulations had yet been made for carrying into effect the treaty of 1844, and that the jurisdiction of the French agents in China, having no other legal basis than the *ordonnance* of 1681, were, consequently, bound to conform to the dispositions of that *ordonnance*. But, on the 8th of July, 1852, a law was passed for the purpose of regulating the jurisdiction of French consuls in China, conformably to the dispositions of the treaty of 1844. With respect to civil jurisdiction, that law reënacts, with some exceptions, the provisions of the

edict of June, 1778, relating to the Levant and Barbary; and, with respect to criminal jurisdiction, it conforms generally to the law of May 28th, 1836, relating to the same countries. Appeals, in certain specified cases, are allowed from the French consular tribunals in China to the French court of appeals in Pondichery. By recurring to the ordonnance and law above referred to, it will be seen that the jurisdiction and proceedings of the French consular courts in the east are regulated with great minuteness of detail. (*De Clercq, Guide des Consulats*, pp. 150–153; *De Clercq, Formulaire des Chancelleries*, tome 2, pp. 369–374; *Ordonnance d'août 1681*, liv. 1, tit. 9, arts. 13–15; *Moreuil, Manuel des Agents Cons.*, pp. 379 et seq.)

§ 29. By the treaty of July 3d, 1844, between the United States of America and China, it was stipulated as follows: “Article twenty-first. Subjects of China, who may be guilty of any criminal act toward citizens of the United States, shall be arrested and punished by the Chinese authorities, according to the laws of China. And citizens of the United States, who may commit any crime in China, shall be subject to be tried and punished only by the consul or other public functionary of the United States, thereto authorized, according to the laws of the United States. And, in order to the prevention of all controversy and disaffection, justice shall be equitably and impartially administered on both sides.” “Article twenty-fourth. If citizens of the United States have special occasion to address any communication to the Chinese local officers of government, they shall submit the same to consul or other officer, to determine if the language be proper and respectful, and the matter just and right in which event he shall transmit the same to the appropriate authorities, for their consideration and action in the premises. In like manner, if subjects of China have special occasion to address the consul of the United States, they shall submit the communication to the local authorities of their own government, to determine if the language be respectful and proper, and the matter just and right, in which case the said authorities will transmit the same to the consul, or other officer, for his consideration and action in the premises. And if controversies arise between citizens of the United States and subjects China, which cannot be amicably settled other-

wise, the same shall be examined and decided conformably to justice and equity, by the public officers of the two nations acting in conjunction." "Article twenty-fifth. All questions in regard to rights, whether of property or person, arising between citizens of the United States in China shall be subject to the jurisdiction and regulated by the authorities of their of their own government. And all controversies occurring in China, between citizens of the United States and the subjects of any other government, shall be regulated by the treaties existing between the United States and such governments, respectively, without interference on the part of China." (*U. S. Statutes at Large*, vol. 8, pp. 592 et seq.; *Wheaton, Elem. Int. Law*, pt. 2, ch. 2, § 11; *Chinese Treaties, Hong-kong*, 1844, pp. 45-48.)

§ 30. Mr. Cushing, the American commissioner who negotiated this treaty with China, in his letter to the American secretary of state, dated September 29th, 1844, says: that he entered China with the general conviction that the United States ought not to concede to any Mohammedan or pagan state, under any circumstances, the local jurisdiction over a citizen of the United States, which was claimed and exercised by foreign *christian* states. "In our treaties with the Barbary States, with Turkey, and with Muscat, I had the precedent of the assertion, on our part, of more or less of exclusion of the local jurisdiction, in conformity with the usage, as it is expressed in one of them, observed in regard to the subjects of other christian states. In China, I found that Great Britain had stipulated for the absolute exemption of her subjects from the jurisdiction of the empire, while the Portuguese attained the same object through their own local jurisdiction at Macao. I deemed it, therefore, my duty, for all the reasons assigned, to assert a similar exemption on behalf of the citizens of the United States. This exemption is agreed to in terms by the letter of the treaty of Wang Hiya. And it was fully admitted by the Chinese, in the correspondence which occurred contemporaneously with the negotiation of the treaty, on occasion of the death of Sha Aman. \* \* \* By that treaty, thus construed, the laws of the United States follow its citizens, and its banner protects them, even within the domain of the Chinese empire.

The treaties of the United States with the Barbary powers, and with Muscat, confer judicial functions on our consuls in those countries, and the treaty with Turkey places the same authority in the hands of the minister or consul, as the substitute for the local jurisdiction, which, in case of controversy, would control if it arose in Europe or America. These treaties are, in this respect, accordant with general usage, and what I conceive to be the principles of the law of nations in relation to the non-christian powers. In extending these principles to our intercourse with China, seeing that I have obtained the concession of absolute and qualified ex-territoriality, I consider it well to use, in the treaty terms of such generality, in describing the substitute jurisdiction, as while they held unimpaired the customary or law of nations jurisdiction, do also leave to congress the full and complete direction to define, if it please to do so, what officers, with what powers, and in what form of law, shall be the instruments for the protection and regulation of the citizens of the United States." Mr. Cushing, in commenting upon this treaty, shows that it confers on citizens of the United States, in China, absolute and unqualified ex-territoriality in all *criminal* matters, and provides, with respect to *civil* matters: 1st. That questions arising *between citizens of the United States*, in China, shall be subject to the jurisdiction, and be regulated by the *authorities* of their own government; 2d, That, in controversies between a citizen of the United States and a Chinese, the authorities of the two governments are to have concerted action; 3d, That, in controversies between a citizen of the United States and any other person, not a Chinese, the adjustment is to be regulated by the international relations of the United States and the government or state of that other person. (*Treaty between the U. S. and China*, art. 25; *Cushing, Opinions U. S. Atty's. Gen'l.*, vol. 7, pp. 498, 501; *Wheaton, Elem. Int. Law*, pt. 2, ch. 2, §. 11.)

§ 81. In order to carry into effect the provisions of the treaty, and to extend our jurisdiction over our people in China, it was necessary to provide for persons clothed with lawful authority for that purpose; and these are described in the treaty as "consuls or other officers," "public officers, the consuls or other public functionary," and "the authorities"

of the United States. But, continues Mr. Cushing, "in thus retaining jurisdiction of our citizens in China, and providing persons to exercise it, we could not rely upon the law of nations exclusively, nor upon usages, or a customary local code applicable to the emergency, such as exist in the Levant." Accordingly, the statute of August 11th, 1848, provides the following system of laws for the exercise and enforcement of such jurisdiction; 1st, The laws of the United States, "so far as such laws are suitable to carry said treaty into effect; 2d, "The common law," in all cases where the laws of the United States "are not adapted to the subject, or are deficient in the provisions necessary to furnish suitable remedies;" 3d, "Decrees and regulations," by the commissioner, "which shall have the force of law," and supply such defects and deficiencies "as still remain to be supplied," and the regulations, orders and decrees, "made by the commissioner, with advice of the several consuls, must be transmitted to the President, to be laid before congress for its revision," but they are to be "binding and obligatory until annulled or modified by congress." The first, second and third sections of the statute give to the commissioner and consuls the judicial authority necessary to execute the provisions of the treaty, without, however, distributing it between them. It describes the manner in which they are to administer law in China, in criminal cases, and, also, in *certain* civil cases; but "is absolutely silent," says Mr. Cushing, with respect to a large class of cases where no questions of mere damage is involved, such as many suits *in rem*, and many others *de re*; cases of property where only equitable relief is asked; "cases of co-partnership, or joint interest in real or personal estate; of *insolvency*, of divorce, of alimony, of wills, and of intestate succession." And as the statute is absolutely silent as to these matters, the distribution of them "is to be made by regulation, in subordination always to other specific rules of law." Again, he says: "The commissioner and the consuls shall make provision, in the manner indicated by the statute, that is, by separate or joint regulations, (secs. four and five,) concerning all those things, the jurisdiction of which it leaves indeterminate, and, therefore, subject to 'regulation.'" Matters of *insolvency*, *intestacy*, *probate of will*, *divorce*, *division*

or regulation of copartnership, or other common interests, habeas corpus, specific performance, trust, discovery, seaman's wages, charter party, bottomry, and other matters of equity, admiralty, or ecclesiastical law, are, for the most part, of local nature, and requiring prompt interlocutory action of judicial authority, and, therefore, seem to be fit subjects for the original jurisdiction of the consuls, with proper regulations for appeal to the commissioner. "On the other hand, some processes, like mandamus, prohibition, supersedeas, are of so high a nature that, like review, they seem appropriate to the jurisdiction of the commissioner. The same observation may apply to some processes in equity. Even, as to all these matters, which the statute leaves undetermined, the safer course appears to me to be to adhere, so far as may be, to the spirit of the law, which makes the commissioner the appellate supervisor of the judicial acts of the consuls." It will be perceived, by referring to the act, that its provisions, respecting criminal jurisdiction and proceedings, are more definite and minute, specifying in what cases appeals may be taken to the commissioner, the amount of fines which may be imposed, and the nature and extent of punishments which may be inflicted, the means for enforcing judgments and sentences, etc. (*Gardner, Institutes*, p. 503; *U. S. Statutes at Large*, vol. 9, p. 276; *Cushing, Opinions U. S. Att'ys Genl.*, vol. 7, pp. 510, 511; *Forbes v. Scannel*, 13 *Cal. Rep.*, p. 242.)

§ 32. On the second day of October, 1854, the U. S. commissioner to China, with the advice of the U. S. consuls, issued a decree distributing the judicial authority conferred upon the commissioner and consuls, by the statute of August 11th, 1848, to execute the provisions of the treaty in certain cases which had not been provided for in the statute, otherwise than by conferring the authority in general terms. This decree provides detailed "rules and regulations" for the law and equity jurisdiction of the United States' consular courts in China, the issuing of writs and processes, etc. It says: "The United States consular court may exercise equity jurisdiction where the subject matter complained be a matter of; first, accident and mistake; second, account; third, fraud; fourth, infants: fifth, specific performance of agreements;

sixth, trusts. \* \* \* As to *trusts*, equity will superintend and protect the creation of trusts, whether vesting in the trustee real or personal estate, and take jurisdiction of trusts, whether resulting from an express deed, or the force of circumstances and the situation of parties, which latter are implied trusts." The decree provides, in detail, for new trials and appeals from the consular courts in all proceedings at law, and adds: "New trials and appeals shall lie from the equity jurisdiction of the United States consular court as from the common law jurisdiction of the same." It is thus seen, that the treaty, the act of August 11th, 1848, and the commissioner's decree of Oct. 2d, 1854, furnish a complete system of law and jurisprudence, and courts of competent jurisdiction, for the punishment of crimes and offenses committed by American citizens in China, and for the determination of all disputes between such citizens. It remains to be considered whether the system embraces questions of dispute between such citizens and other foreigners resident there. ("*The China Mail*," May 15th, 1856; *Forbes v. Scanlon*, 18 *Cal. Rep.*, p. 242.)

§ 38. It will be observed that, according to the provisions of the foregoing treaties, where controversies arise, in China, between citizens of the United States and subjects of Great Britain or France, the Chinese laws do not apply, nor can the Chinese tribunals give any relief. The jurisdiction of such controversies is left to be determined by treaties between the respective governments. But as no such special treaties have ever been made, and, perhaps, never will be made, are there no means left for the determination of such controversies? Is the system of law and jurisdiction established by the treaty, and by the act of 1848, so imperfect and defective, that Asiatic, European, and non-resident Americans in China have no means of determining their controversies with Americans resident there; and can American residents have no judicial relief against other resident or domiciled foreigners? There is no plainer or better established principle of public law than this, that alien friends may sue in the courts of the *defendant's* country. Now, in China, as in other unchristian countries, American citizens and American consular courts enjoy the rights of ex-territoriality, and the same may be said of British

and French citizens, and British and French consular courts. Each one is, in the eye of the law, to be considered within the territory of its own state. It follows, therefore, that an American in China may resort to the British courts there against an Englishman, or to the French courts there against a Frenchman, precisely as he might in England or France, and that an Englishman or a Frenchman may resort to American courts in China against an American, precisely as he might in the United States. The maxim of the Roman law, *actor sequitur forum rei*, is an admitted principle of the jurisprudence of all civilized nations. (*Fœlix, Droit Int. Privé*, tit. 11, ch. 2; *Cushing, Opinions U. S. Att'ys Gen.*, vol. 7, pp. 517, 518; *De Clercq, Guide des Consuls*, pp. 697-702; *Riquelme, Derecho Pub. Int.*, lib. 2, tit. 1, cap. 5; *Forbes v. Scannel*, 18 Cal. Rep., p. 242.)

§ 84. The United States Attorney-General, Mr. Cushing, in his official opinion, has fully discussed this question with respect to the jurisdiction of the United States courts in China. In a civil controversy, arising under a demand by a Chinese against an American, he says: "The Chinese will go into the United States consular court as plaintiff, and that court will take jurisdiction of the defendant as an American; and where the demand is by an American against a Chinese, the former must, of necessity, be content with such judicial or executive action of the Chinese government in the premises as appertains to their institutions, and as, by application, may be required on the part of the United States. As to the other case," he continues, "that of controversies occurring in China between citizens of the United States and subjects of any other (Christian) government, the treaty provides that the same 'shall be regulated by the treaties existing between the United States and such governments, respectively, without interference on the part of China.' (*Art. twenty-five.*) Now, we have no *special* treaty with any of these governments on this point, nor is any needed, or necessarily required or intended by the stipulation under consideration. With all, we have treaties of amity, or of ordinary commercial and social intercourse, and that suffices to meet the exigency. But, by the tenor of those treaties, as they are construed by the law and usage of nations, an Englishman



has the right to sue a resident American, or an American a resident Englishman, as alien friend, in all places wherever, respectively, the jurisdiction of the other country exists locally, and is complete as to subject matter, persons, and remedial forms. The jurisdiction of the United States is complete as to their citizens in China, and the jurisdiction of Great Britain is complete as to her subjects in China. That the jurisdiction, in each case, is ex-territorial; that in China it is excepted from the local territoriality, and that it is outside of the territoriality of either Great Britain or the United States, is a fact wholly immaterial to the question. It is a question free of all doubt on principles of international right, and subject only to the single inquiry, whether the given country, each proceeding in established legal forms, by whatsoever authority such forms be established, has conferred on its courts of justice in China jurisdiction *ad hoc*, or whether that remains to be done. Here, again, the statute is explicit and ample. It confers on the consular courts jurisdiction of 'all civil cases arising under said treaty.' A demand of an Englishman against an American is a civil case arising under the treaty, as we see. Therefore, a suit may be brought by the Englishman against the American in the consular court of the United States; as, undoubtedly, in the consular of Great Britain, it may, consistently with public law, be brought by an American against an Englishman. If the Englishman were within the territorial jurisdiction of the United States he might sue, but would also be subject to suit in the local courts, as the American might and would be in England. Nay, a suit would lie in the courts of Great Britain or the United States, between residents, both being aliens in the country. In China, the relative condition of all these persons differs in this, that the local courts of each government, being ex-territorial ones, have no territorial jurisdiction, but only a jurisdiction as respects persons, namely, its own citizens or subjects. Of course, neither government can take compulsory jurisdiction there of a subject or citizen of any other, but each may act compulsorily upon its own, at the suit of that of another. Perhaps neither government is under perfect obligation to do this, but it may do so in obedience to national comity;

it can rightfully do so if it will; and its obligation to do so will be perfect, provided the exercise of the right be reciprocated by the other government." These views are recognized and carried out in the "rules and regulations" for the United States consular trust in China, contained in the decree of Commissioner McLane, dated October 2d, 1854. In rule second, it says: "When a citizen of the United States, who is a resident in China, or any subject of the Emperor of China, or the citizen or subject of any other state or nation, may have a right to bring suit against a citizen of the United States in the United States consular court in China, has a claim arising on contract and already due, against any citizen of the United States residing in China, may apply to the United States consular court where the debtor resides, to declare him insolvent, and close his affairs," etc. (*Cushing, Opinions U. S. Att'ys. Gen'l.*, vol. 7, pp. 517-519; "*The China Mail*," May 15, 1856; *Forbes v. Scannel*, 13 *Cal. Rep.*, p. 242; *Foelix, Droit International Privé*, tit. 11, ch. 2.)

## CHAPTER XI.

## MUTUAL DUTIES OF STATES.

## CONTENTS.

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§ 1. Having discussed the general rights of sovereign and independent states, with respect to their relations with each other, it is proposed here, to consider briefly the duties resulting from, or corresponding to, such rights. Every right has its correlative duty. As the international rights of states are divided into *perfect* and *imperfect rights*, so the corresponding international obligations may be also divided into *perfect* and *imperfect duties*. It will be remembered that any right of a sovereign state is none the less a right because it is classed as imperfect in international jurisprudence, or

because it cannot be absolutely demanded and enforced under the positive law of nations; so, the corresponding obligation, although imperfect, is, nevertheless, a duty binding upon the conscience of the nation which owes it. Some writers have objected to the use of the terms *imperfect* rights and *imperfect* duties, considering all rights as *perfect*, or *stricti juris*, and their corresponding duties as *absolute*; while what Vattel calls imperfect rights and duties, are classed as usages of comity,—*comitas gentium*,—or laws of convenience,—*droit de convenance*. The distinctions made by Vattel are well founded, and his terms, although perhaps not well chosen, are now thoroughly incorporated into the technical vocabulary of international science, and their meaning is well understood. (*Paley, Moral and Pol. Philosophy*, b. 2, chs. 9, 10; *Vattel, Droit des Gens*, prelim., §§ 17, 18; *Phillimore, On Int. Law*, vol. 1, §§ 140–148, 167, 170; *Wheaton, Elem. Int. Law*, pt. 2, ch. 4, §§ 12, 14, 18, 19; *Bowyer, Universal Public Law*, chs. 5, 13; *Massé, Droit Commercial*, tome 1, §§ 45, 46; *Heineccius, de Jur Princip.*, § 2; *De Felice, Droit de la Nat. et des Gens*, tome 2, lec. 17; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 1.)

§ 2. In discussing the mutual duties of states, we will consider: *First*, those *perfect* duties which one state is absolutely bound to perform, and which others have a perfect right to demand, such as the obligations to render justice to others, and to permit to them the enjoyment of the rights of independence, of equality, of property, of legislation and jurisdiction, of legation and treaty, etc.; *second*, those *imperfect* duties which are recognized by international jurisprudence as binding obligations, but which those to whom they are due cannot claim and enforce as absolute rights, such as the ordinary duties of comity, of diplomatic and commercial intercourse, etc.; and *third*, those *imperfect* duties which rest solely upon the law of nature, and are not taken cognizance by the positive law of nations, such as the offices of humanity, of friendships, of reciprocal kindness, etc. (*Paley, Moral and Pol. Philosophy*, b. 2, ch. 10; *Vattel, Droit des Gens*, prelim., §§ 17, 18; liv. 2, ch. 1; *Wheaton, Elem. Int. Law*, pt. 2, ch. 4, §§ 12, et seq.; *Bowyer, Universal Public Law*, chs. 5, 13; *De Felice, Droit de la Nat., etc.*, tome 2, lecs. 15, 16; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 1.)

§ 3. The obligation of a state to render justice to all others is a *perfect* obligation, of strictly binding force, at all times and under all circumstances. No state can relieve itself from this obligation, under any pretext whatever. It is an obligation, according to Vattel, "more necessary still between nations than between individuals; because injustice has more terrible consequences in the quarrels of these powerful bodies politic, and it is more difficult to obtain redress." The same rule applies to all the duties of a state which result from the *perfect* international rights of others, for whatever one nation has a perfect right to demand of another, that other is absolutely bound to render. The rule is absolute, and cannot be evaded under any technicality, sophistry, or other pretext. Whatever one state can claim as its perfect right, it is the absolute duty of every other to concede. To refuse it, under whatsoever pretext, would be a violation of the positive rule and fundamental principle of international jurisprudence. And no civilized nation can now be found to refuse to another an acknowledged and indisputable right. They may dispute the right itself, and deny its existence as a right, but there are none so low and debased in moral character as to deny their duty and obligation to respect the manifest and acknowledged international rights of others. Moreover, this obligation of the state is equally binding upon all its, rulers, officers and citizens,—in fine, upon each and every individual member which compose the state or body politic. (*Paley, Moral and Pol. Philosophy*, b. 1, ch. 10; *Vattel, Droit des Gens*, liv. 2, ch. 5, §§ 63–66; *Webster, Dip. and Off. Papers*, p. 167; *De Felice, Droit de la Nat., etc.*, tome 2, lecs. 14, 15; *Burlamaqui, Droit de la Nat. et des Gens*, tome 4, pt. 3, ch. 1; *Phillimore, On Int. Law*, vol. 1, p. 35; *Mackintosh, Miscellaneous Works*, p. 181.)

§ 4. The question here arises, how far a state is responsible for the acts of its rulers, officers, and private citizens, or, in other words, what are to be considered as the acts of the state, and what as the acts of individuals. There can be no doubt with respect to its responsibility for the acts of its rulers, whether they belong to the executive, legislative, or judicial department of the government, so far as the acts are done in their official capacity. States have relations with

each other only through their respective governments, and, in international jurisprudence, the government is the state, no matter what may be its form or duration, whether it be a despotism, or a pure republic; whether it be a mere *de facto* government, organized for a temporary purpose, or one deriving its authority from long ages of legitimate descent. (*Vattel, Droit des Gens*, liv. 2, ch. 3, § 38; *Phillimore, On Int. Law*, vol. 1, § 168; *Rutherford, Institutes*, b. 2, ch. 9, §§ 12, 13; *De Felice, Droit de la Nat., etc.*, tome 2, lec. 9; *Burlamaqui, Droit de la Nat. et des Gens*, tome 4, pt. 3, ch. 1.)

§ 5. The question, however, assumes a different aspect when we consider the acts of the subordinate officers of a state. A state is undoubtedly responsible for *all* the acts of its ambassadors and other public ministers furnished with *full power*, and also of all its diplomatic agents, within the limits of their presumed powers and duties, until such acts are expressly disclaimed by the state as being unauthorized. And even then it is bound, in general, to repair the wrong and to punish the offender; for a mere disclaimer is not always satisfactory to the party agrieved. This rule is particularly applicable to the acts of its military and naval forces. These are regarded as the peculiar guardians of the honor and dignity of the state as represented by the flag under which they serve; moreover, the rigor of military law and military discipline would, by presumption, give to the act of a military officer a much higher degree of authority and responsibility than the act of a mere civil functionary. The former are under the immediate orders and direction of the head of the state, while the latter, though supposed to be governed by the laws of the state, are not always subject to the immediate direction of its executive government, or amenable to punishment. The act of a military or naval officer, in his official capacity, is, therefore, *prima facie* the act of his government, and is to be so regarded till disavowed by his government. The officer's commission is, in general, to be regarded as sufficient evidence of his authority. If the act of the officer be disavowed by his government, the latter is bound to punish him, or to surrender him for punishment by the injured party. (*Leiber, Political Ethics*, b. 7, § 26; *De Felice, Droit de la Nat., etc.*, tome 2, lec. 15; *Burla-*

*maqui, Droit de la Nat. et des Gens*, tome 7, pt. 8, chs. 1, 2; *Gardner, Institutes*, p. 546.)

§ 6. Vattel discusses, at considerable length, the question, how far the sovereign or state is responsible to another for the acts of private citizens or subjects. "Whoever," he says, "offends the state, injures its rights, disturbs its tranquility, or does it a prejudice in any manner whatsoever, declares himself its enemy, and puts himself in a situation to be justly punished for it. Whoever uses a citizen ill, indirectly offends the state, which ought to protect this citizen, and his sovereign should revenge the injuries, punish the aggressor, and, if possible, oblige him to make entire satisfaction; since, otherwise, the citizen would not obtain the great end of the civil association, which is safety. On the other hand, the nation, or the sovereign, ought not to suffer the citizens to do an injury to the subjects of another state, much less to offend the state itself. And that, not only because no sovereign ought to permit those who are under his command to violate the precepts of the law of nature, but, also, because nations ought mutually to respect each other, to abstain from all offense, from all injury, and, in a word, from everything that may be of prejudice to others. If a sovereign, who might keep his subjects within the rules of justice and peace, suffers them to injure a foreign nation, either in its body or its members, he does no less injury to that nation, than if he injured them himself. In short, the safety of the state, and that of human society, requires this attention from every sovereign." Again, "as it is impossible for the best regulated state, or for the most vigilant and absolute sovereign, to model, at his pleasure, all the actions of his subjects, and to confine them, on every occasion, to the most exact obedience, it would be unjust to impute to the nation, or to the sovereign, all the faults of the citizens. We ought not then to say, in general, that we have received an injury from a nation, because we have received it from one of its members." The act of the individual is not necessarily and of consequence the act of the state, nor would it be just, in all cases, to hold a state responsible for the act of each individual member of which it is composed. The responsibility of the state results from its neglect or inability to control the

conduct of its subjects, or its neglect or inability to punish the offenses and crimes which they commit. (*Vattel, Droit des Gens*, liv. 2, ch. 6, §§ 71, 72; *Phillimore, On Int. Law*, vol. 1, § 218; *Rutherford, Institutes*, b. 2, ch. 9, § 12; *De Felice, Droit de la Nat., etc.*, tome 2, lec. 15; *Burlamaqui, Droit de la Nat. et des Gens*, tome 4, pt. 3, ch. 2.)

§ 7. But, says the same author, if a nation, or its ruler, approves and ratifies the act committed by a citizen, it makes that act its own; the offense must then be attributed to the nation as the true author of the injury, of which the citizen is, perhaps, only the instrument. So, also, the sovereign who refuses to cause a reparation to be made of the damage done by his subject, or to punish the guilty, or, in short, to deliver him up, renders himself, in some measure, an accomplice in the injury, and becomes responsible for it. If a nation should refuse or fail to pass the laws necessary to restrain its citizens from aggressions upon other states, or upon their citizens, or if, such laws being enacted, the officers of the state neglect to enforce them, and such aggressions by individuals result therefrom, the state is unquestionably responsible for the injury. (*Vattel, Droit des Gens*, liv. 2, ch. 6, §§ 74–77; *Phillimore, On Int. Law*, vol. 1, § 218; *Rutherford, Institutes*, b. 2, ch. 9, § 12; *De Felice, Droit de la Nat., etc.*, tome 2, lec. 15; *Burlamaqui, Droit de la Nat. et des Gens*, tome 4, pt. 3, ch. 2.)

§ 8. “There is another case,” he continues, “where the nation in general is guilty of the base attempt of its members. This is when, by its manners, or the maxims of its government, it accustoms and authorizes its citizens to plunder and ill use foreigners, or to make inroads into neighboring countries, etc. Thus, the nation of the Usbecks is guilty of the robberies committed by the individuals of which it is composed. The princes, whose subjects are robbed and massacred, and whose lands are infested by these robbers, may justly punish the entire nation. What do I say?—all nations have a right to enter into a league against such a people, to repress them, and to treat them as the common enemies of the human race.” So, with respect to Algiers, and the states of the Mediterranean, from whose ports issued numerous corsairs to prey upon the commerce of other nations; who



would say that the whole state was not justly punishable for these acts of its subjects? or who would think of applying to them the doctrine that the individual alone was responsible? There are, in modern times, and among christian states, Usbecks and Algerines, in practice, if not in principle. If a state should neglect to enact the requisite laws to restrain its subjects and citizens from repeated and systematic aggressions upon the rights of others, or to enforce such laws when enacted, it not only exposes itself to the just hostilities of the parties aggrieved, but virtually becomes an outlaw from the society of nations, and, by the well established principles of international jurisprudence, is liable to be attacked and punished by all, as the universal enemy of mankind. Systematic and organized aggressions upon the rights of independent states, and robbery and plunder upon land, by whatsoever name they may be called, or under whatsoever pretext they may be carried on, are as objectionable in their character, and as dangerous in their tendency, as piracy on the high seas. Piracy, under the law of nations, by whomsoever or wheresoever committed, may be tried and punished in the courts of justice of any nation, inasmuch as all nations have an equal interest in the apprehension and punishment of such offenses against international law. And it has been contended by some, that the same principle is applicable to similar crimes committed on land, and that those who, without the authority or commission of any state, and in defiance of all law, organize and band together for predatory and illegal military expeditions, are equally punishable, under the law of nations, in the courts of any state having custody of the offenders. However this may be, and whether or not such individual offenders are justiciable in the same manner as pirates, there can be no question of the guilt and responsibility of a government which encourages or permits its private citizens to organize and engage in such predatory and unlawful expeditions against a state with which that government is at peace. Nor does it matter much what may be the ostensible or intended object of such unauthorized expeditions; whether it be to overthrow a despotism, or repress anarchy, and to establish a liberal government in their place, or to destroy a liberal government, and to establish a despot-

ism, or produce general anarchy, the offense, in international law, is the same. In either case, it is a violation of the international rights of others, and the state which permits its citizens or subjects to commit the offense, or neglects to punish them for it, is responsible for their acts. (*Vattel, Droit des Gens*, liv. 2, ch. 6, § 78; *Wheaton, Elem. Int. Law*, pt. 2, ch. 2, § 15; *Rutherford, Institutes*, b. 2, ch. 9, § 12; *Alison, Hist. of Europe*, second series, ch. 12, § 41; *President's Annual Message*, 1857; *De Felice, Droit de la Nat., etc.*, tome 2, lec. 15; *Burlamaqui, Droit de la Nat. et des Gens*, tome 4, pt. 3, ch. 2; *De Cussy, Droit Maritime*, liv. 2, ch. 36, §§ 1-4.)

§ 9. Attempts have sometimes been made to excuse the state, or to exempt it from responsibility, for the acts of its citizens who engage in such unauthorized and illegal military expeditions, or who organize, or assist in organizing, "filibuster" expeditions against other nations, on the ground that such citizens are, by the very act of emigration, virtually *expatriated*, and can no longer be regarded as subjects whose conduct the state can control, or for whose acts it can be held responsible. The right of voluntary expatriation in time of peace, will be considered in another place; it is sufficient for the present discussion to remark that, even admitting this right to the fullest extent which has been claimed by the courts and jurists of the United States, all agree that it can never be pleaded in justification of an offense against law, public or municipal, which was committed or contemplated in the act of pretended emigration. If individuals were allowed to escape punishment for engaging in illegal enterprises, on the ground of expatriation by pretended emigration, the same excuse could be appealed to to cover treason, desertion, and other crimes, and to avoid the performance of local contracts. And if individuals cannot escape responsibility to their own government, for any unlawful act contemplated at the time of emigration, which they may do, it clearly follows that the state cannot escape moral or legal responsibility for the unlawful acts of its citizens, under the plea of their implied expatriation by pretended emigration. Emigration for an unlawful purpose is, in itself, an unlawful act, and may be prohibited by the state; and if such contemplated emigration of its citizens is intended to infringe the rights of

a friendly nation, it is undoubtedly the duty of the state to exercise its right of prohibition and power of prevention. It cannot escape the responsibility of neglecting that duty, under the miserable pretext of the voluntary emigration, and consequent expatriation, of its citizens. (*Kent, Com. on Am. Law*, vol. 2, p. 49; *Cushiny, Opinions U. S. Att'ys Gen.*, vol. 8, p. 139; *President's Annual Message*, 1857; *Alison, Hist. of Europe*, second series, ch. 12, § 41; *Jefferson, Am. State Papers Foreign Relations*, vol. 1, p. 168; *Talbot v. Janson*, 3 *Dallas Rep.*, p. 133; *Sergeant, Constitutional Law*, p. 319; *U. S. v. Williams*, 2 *Cranch. Rep.*, p. 82, note; *Murry v. The Charming Betsey*, 2 *Cranch. Rep.*, pp. 64, 119; *The Santissima Trinidad*, 7 *Wheaton Rep.*, pp. 283, 347; *De Felice, Droit de la Nat.*, etc., tome 2, lec. 15; *Burlamaqui, Droit de la Nat. et des Gens*, tome 4, pt. 3, ch. 2; *De Cussy, Droit Maritime*, liv. 2, ch. 36, §§ 1-4.)

§ 10. It is the duty of every state to show all proper respect and honor to other sovereign states, whether the dignity of such states be represented in the person of their sovereign, their flag, their ministers, or their subordinate officers. A want of respect to a subordinate officer, however, is not, by any means, to be necessarily construed into a want of respect for the state to which he belongs, for such officers do not, necessarily, nor even by implication, represent the dignity of their state or nation. To be wanting in respect to the representatives and officers of other states is a mark of ill-will, and such conduct is equally contrary to sound policy, and to what nations owe to each other. This most blamable and criminal disposition of states to imagine themselves insulted, where really no disrespect is intended, is thus forcibly described by Dymond: "The wars that are waged for *insults to flags*, and an endless train of similar motives, are perhaps generally attributable to the irritability of our pride. We are at no pains to appear pacific toward the offender, our remonstrance is a threat, and the nation which would give satisfaction to an *inquiry*, will give no other answer to a menace than a menace in return. At length we begin to fight, not because we are aggrieved, but because we are angry. One example may be offered. In 1789, a small Spanish vessel committed some violence in Nootka Sound, under the pretence that the country

belonged to Spain. This appears to have been the principal ground of offense, and, with this, both the government and people of England were very angry. The irritability and haughtiness which they manifested were unaccountable to the Spaniards, and the peremptory tone was imputed by Spain, not to the feelings of offended dignity and violated justice, but to some lurking enmity and some secret designs which we did not choose to avow. If the tone had been less peremptory, and more rational, no such suspicion would have been excited, and the hostility which was consequent upon the suspicion would, of course, have been avoided. Happily, the English were not so passionate but that, before they proceeded to fight, they negotiated and settled the affair amicably. The *preparations* for this foolish war cost, however, three millions one hundred and thirty-three thousand pounds." (*Paley, Moral and Pol. Philosophy*, b. 6. ch. 12; *Vattel, Droit des Gens*, liv. 2, ch. 8, § 47; *Dymond, Essays on the Prin. of Morality*, essay 3, ch. 19; *De Felice, Droit de la Nat., etc.*, tome 2, lec. 15.)

§ 11. But to fail in matters merely ceremonial, by not rendering the respect and honor which usage and custom have established as properly due to others, is not necessarily an insult to the dignity of a state or of its sovereign. "It is proper," says Vattel, "to distinguish between negligence, or the omission of what ought to be done according to commonly received custom, and positive acts of disrespect and insult. The prince may complain of negligence, and, if it is not repaired, may consider it as a mark of a bad disposition; he has a right to demand, even by force of arms, the reparation of an insult. The czar, Peter I., complained in his manifesto against Sweden, of their not having fired the cannon on his passage to Riga. He might think it strange that they did not pay him this mark of respect, and he might complain of it; but to make this the cause of a war, was being extremely prodigal of human blood." The subject of military and maritime ceremonial, as connected with international etiquette and intercourse, has already been discussed in the chapter on the rights of equality. (*Vattel, Droit des Gens*, liv. 2, ch. 8, § 48; *Ortolan, Diplomatie de la Mer*, liv. 2, ch. 15; *De Felice, Droit de la Nat., etc.*, tome 2, lec. 15; *Paley, Moral and Pol. Philosophy*, b. 6, ch. 12.)

§ 12. Vattel lays down the general rule that "every nation, in virtue of its natural liberty, has a right to trade with those which shall be willing to correspond with such intentions, and to molest it in the exercise of its right, is an injury. The Portuguese, at the time of their great power in the East Indies, were for excluding all other European nations from any commerce with the Indians; but a pretention, no less iniquitous than chimerical, was made a jest of, and the nations agreed to look on any acts of violence in support of it as just causes of war. This common right of all nations is, at present, acknowledged under the appellation of freedom of trade." This right, however, is to be distinguished from the claim of one nation to trade with the colonies or dependencies of another. (*Vattel, Droit des Gens*, liv. 2, ch. 2, § 24; *Puffendorf, de Jur. Nat. et Gent.*, lib. 4, cap. 5, § 10; *Martens, Precis du Droit des Gens*, §§ 152, 153; *Chitty, Commercial Law*, vol. 1, p. 76; *Massé, Droit Commercial*, liv. 1, tit. 1; *De Felice, Droit de la Nat.*, etc., tome 2, lec. 17; *Melou, Essai Politique sur le Commerce*, ch. 1; *Burlamaqui, Droit de la Nat. et des Gens*, tome 4, pt. 3, ch. 4.)

§ 13. To this right of trade there is a corresponding duty of mutual commerce, founded on the general law of nature; for, says Vattel, "one country abounds in corn, another in pastures and cattle, a third in timber and metals; all these countries trading together, agreeably to human nature, no one will be without such things as are useful and necessary, and the views of nature, our common mother, will be fulfilled. Further, one country is fitter for some kind of products than another; as for vineyards more than tillage. If trade and barter take place, every nation, on the certainty of procuring what it wants, will employ its industry and its ground in the most advantageous manner, and mankind in general proves a gainer by it. Such are the foundations of the general obligation incumbent on nations reciprocally to cultivate commerce. Therefore, every one is not only to join in trade as far as it reasonably can, but even to countenance and promote it." (*Burlamaqui, Droit de la Nat. et des Gens*, tome 4, tit. 3, ch. 4; *Vattel, Droit des Gens*, liv. 2, ch. 2, §§ 21, 22; *Smith, Wealth of Nations*, pp. 226-253; *Martens, Precis du Droit des Gens*, §§ 149, et seq.; *Garden, De Diploma-*

tic, tome 1, pt. 3; *Massé, Droit Commercial*, liv. 1, tit. 1; *De Felice, Droit de la Nat., etc.*, tome 2, lec. 17.)

§ 14. The general right of trade, and the general duty of a state to facilitate commercial intercourse with others, are well settled principles of international law; nor is it anywhere denied that a nation has a right to decline a particular commerce which it may deem disadvantageous or injurious. But the question has sometimes been discussed, whether a state has a right to absolutely decline commercial intercourse with others, and whether, by so doing, it does not subject itself to punishment for a violation of a positive law of nations. Vattel says, that as every state has a perfect right to determine what is useful or salutary for it, it becomes a duty, as well as a right, for a nation to judge whether it is expedient to engage in a proposed trade, or to refuse any commercial overtures from others, and that such others have no "right to accuse it of injustice, or to demand a reason for such refusal, much less, to use compulsion. It is free in the administration of its own affairs, without being accountable to any other. The obligation of trading with a foreign state is imperfect in itself, and gives them only an imperfect right; so that in cases where the commerce would be detrimental, it is entirely void." "The Spaniards, falling on the Americans, (Indians) under a pretence that these people refused to traffic with them, endeavored in vain to cover their insatiable avarice." (*Vattel, Droit des Gens*, liv. 2, ch. 2, § 25; *Martens, Precis du Droit des Gens*, §§ 189, et seq.; *Massé, Droit Commercial*, liv. 1, tit. 1; *De Felice, Droit de la Nat., etc.*, tome 2, lec. 17; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 3; *Burlamauqui, Droit de la Nat. et des Gens*, tome 4, pt. 3, ch. 4.)

§ 15. China and Japan for a long time declined all commercial intercourse with other nations, and even now permit only a very restricted trade, in particular articles, and at particular places. The question was at one time discussed, whether these people could not be compelled to open their ports to foreigners, and engage in trade and general intercourse with the rest of the world. But, as a question of international jurisprudence, it scarcely merits consideration. No doubt on this point could arise in the mind of any person except those who contend that the rules of international law, adopted

by christian nations, are wholly inapplicable to the countries of Asia. But this opinion, although at one time supported by writers of unquestionable ability, is now almost universally rejected by publicists. (*Wheaton, Elem. Int. Law*, pt. 1, ch. 1, § 10; *Phillimore, On Int. Law*, vol. 1, §§ 31-34; *The Madona del Burso*, 4 *Rob. Rep.*, p. 172; *The Hurtige Hane*, 3 *Rob. Rep.*, p. 326; *Martens, Precis du Droit des Gens*, § 150; *Massé, Droit Commercial*, liv. 1, tit. 1.)

§ 16. We have already discussed the duty of diplomatic intercourse, of legation, treaty, etc., and it is only necessary, in this place, to add a few remarks on the general character of the obligations resulting from this class of imperfect rights and duties. As already stated, a right is no less a right because it belongs to the class called *imperfect* in international law; so of a duty, it is none the less obligatory because it is *imperfect*, and cannot be enforced under the rules of international jurisprudence. Thus it is with the principles of natural law with respect to the mutual commerce of states. It is not difficult to point out the general duties of nations with respect to trade, but as each state is the exclusive judge of its own duty in any particular case, the application of a rule founded on generalities must always be uncertain. Therefore, says Vattel, if nations wish to secure to themselves something constant, punctual and determined in trade, treaties are the only means of procuring it. (*Vattel, Droit des Gens*, liv. 2, ch. 2, § 26; *Paley, Moral and Pol. Philosophy*, b. 2, ch. 10; *Wheaton, Elem. Int. Law*, pt. 2, ch. 4, § 18, 19; *Martens, Precis du Droit des Gens*, § 143; *Massé, Droit Commercial*, tome 1, §§ 45, et seq.)

§ 17. With respect to the mutual duties of states, not established or taken cognizance of by the positive law of nations, but resting entirely on natural law, Vattel lays down the general principle, that one state owes to another state whatever it owes to itself, as far as this other stands in need of assistance, and the latter can grant it without neglecting the duties it owes to itself. Such, he says, is the eternal and immutable law of nature. In limitation, or explanation of this rule, he makes the following observations: "Social bodies, or sovereign states, are much more capable of supporting themselves than individuals, and mutual assistance is not

so necessary among them, nor of such frequent use. Now, whatever a nation can do itself, no succor is there due to it from others." (*Vattel, Droit des Gens*, liv. 2, ch. 1, § 3; *Pufendorf, de Jur. Nat. et Gen.*, lib. 3, cap. 3; *Burlamaqui, Droit de la Nat. et des Gens*, tome 3, pt. 3, ch. 4; *De Felice, Droit de la Nat. et des Gens*, tome 2, lec. 16; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 4.)

§ 18. Among the mutual duties of states, arising from natural law, are the offices of humanity, such as relieving the distresses and wants of others, so far as is reconcilable with our duty toward ourselves. Thus, if a nation is suffering under a famine, all others having a quantity of provisions, are bound to relieve its distress, yet, without thereby exposing themselves to want. "But," continues Vattel, "if this nation is able to pay for the provisions thus furnished, it is entirely lawful to sell them at a reasonable rate; for what it can procure is not due to it, and, consequently, there is no obligation of giving for nothing such things as it is able to purchase. Succor, in such a severe extremity, is essentially agreeable to human nature, and a civil nation very seldom is seen to be absolutely wanting in such." Contributions of provisions, by the people of the United States, to the starving population of Ireland and Madeira, are examples of the performance of this natural duty. (*Vattel, Droit des Gens*, liv. 2, ch. 1, § 5; *Burlamaqui, Droit de la Nat. et des Gens*, tome 4, pt. 3, ch. 4; *De Felice, Droit de la Nat., etc.*, tome 2, lec. 16; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 4.)

§ 19. The like assistance is due, whatever be the calamity by which a nation is afflicted. Whole sections of countries are sometimes devastated by floods, and cities and towns destroyed by fires or earthquakes, leaving vast numbers of people destitute of the means of shelter or subsistence. It is, first, the duty of their own government to provide for these wants; but not unfrequently the calamity is so great that the government is unable to give its aid to the extent and within the time required to render it efficacious. In such cases, the laws of humanity would impose a duty upon others. In many instances of this kind, however, the active charity of individuals and communities, renders any action on the part of the governments of other states unnecessary.



But a government may always stimulate and assist such charity, and by thus reflecting and giving effect to the general feelings of its people, manifest its sympathy and generosity. Of such a character was the assistance rendered by the government of the United States for transporting to Ireland the contributions of provisions spontaneously offered by the American people. (*Vattel, Droit des Gens*, liv. 2, ch. 1, § 5; *Burlamaqui, Droit de la Nat. et des Gens*, tome 4, pt. 8, ch. 8; *De Felice, Droit de la Nat., etc.*, tome 2, lec. 16.)

§ 20. A question here arises, how far one state may afford assistance to another nation suffering famine and distresses which immediately result from the operations of a war. We refer, of course, to the offices of humanity, and not to assistance in the means of carrying on hostilities. The furnishing of provisions and clothing to a starving and suffering people, may, or may not, assist in prolonging the war. In case of a siege or blockade, no neutral state can furnish food to the inhabitants of the place so besieged or blockaded, without a violation of its neutral duties, no matter how much they may suffer, or how strong may be the dictates of humanity to relieve such suffering. So, also, an enemy may sometimes devastate whole sections of a country, and reduce the inhabitants to the miseries of famine, but this would not, *ipso facto*, justify another state to furnish them with relief. The rights and duties of the neutral will be determined by the peculiar circumstances of each case, and it would, therefore, be difficult to lay down any positive and invariable rule on this subject. There can be no doubt, however, that when the war is ended, or its operations are removed from the particular place or section of country, foreign nations may extend the offices of humanity to relieve the distresses of a suffering people. Of such a character was the assistance rendered by the people of the United States to the suffering inhabitants of modern Greece, in their struggle against the Turks. (*Grotius, de Jur. Bel. ac Pac.*, lib. 3, cap. 1, § 5; *Bynkershoek, Quaest. Jur. Pub.*, lib. 1, cap. 11; *Vattel, Droit des Gens*, liv. 2, ch. 1, § 5; *De Felice, Droit de la Nat., etc.*, tome 2, lec. 16; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 4; *Gardner, Institutes*, p. 682.)

§ 21. Another question discussed by publicists is, how far it is the duty of one sovereign state to assist in preserving the independence of another state against the designs or attacks of its enemies. There can be no doubt of its duty to exert its moral influence, by way of advice, proffered mediation, etc., for the accomplishment of such an object; but this duty toward others does not extend to the use of force. The use of force for the benefit of others, is not a matter of *obligation*, (unless of treaty stipulation,) and the question is entirely one of *policy*, which every state determines for itself. In Europe the question has been connected with that of preserving the equilibrium of power, and of preventing the aggrandisement of a particular state by the absorption of the dominions of another; as the case of Russia and Turkey in 1854. (*Vattel, Droit des Gens*, liv. 2, ch. 1, § 4; *Phillimore, On Int. Law*, vol. 1, §§ 386, et seq.; *Ortolan, Domaine International*, tit. 3; *De Felice, Droit de la Nat., etc.*, tome 2, lec. 16; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 4; *Burlamaqui, Droit de la Nat. et des Gens*, tome 4, pt. 3, ch. 3.)

§ 22. Having based the obligation of performing the offices of humanity solely on the law of nature, Vattel infers that no nation can refuse them to another on the plea of a difference of religious belief. "A conformity of belief and worship," he says, "may become a new tie of friendship between nations, but no difference in them can warrant us to lay aside the quality of humanity, or the sentiments annexed to it." He quotes with approbation the conduct of Pope Benedict XIV, who, on being informed that several Dutch ships at Civita Vecchia, could not put to sea for fear of some Algerine corsairs, immediately ordered the frigates of the ecclesiastical states to convoy them out of danger; and his nuncio at Brussels was directed to signify to the states-general that His Holiness would perform the duties of humanity without reference to any difference of religion. The same rule extends to commercial rivals. The fact that a state, or any of its inhabitants, are our rivals in trade, would furnish us with no excuse for neglecting toward them the duties of humanity; on the contrary, those engaged in like pursuits are usually best acquainted with each others wants,

and best able to relieve each others necessities. It also extends to cases of national hostility. Frequent wars and mutual aggressions sometimes produce feelings of deep-seated hostility between citizens and subjects of different states. Such enmities do not in any way effect the general obligations of humanity; unfortunately, however, they are not unfrequently made a pretext or excuse for neglecting their performance. The excuse is not admissible in morality, nor will it ever avail much in the general opinion of the world. National enmities, and national vanities, often blunt the sense of natural and moral duty, and are sometimes mistaken for patriotism. (*Vattel, Droit des Gens*, liv. 2, ch. 1, §§ 15, 16; *Leiber, Political Ethics*, b. 3, §§ 65-67; *De Felice, Droit de la Nat., etc.*, tome 2, lec. 16; *Burlamaqui, Droit de la Nat. et des Gens*, tome 4, pt. 3, ch. 8; *Cicero, De Officiis*, lib 3, cap. 6.)

§ 23. As the reciprocation of the duties, or offices of humanity, says Vattel, "is to take place betwixt nation and nation, according as one stands in need, and the the other can reasonably comply with them, every nation being free, independent, and having the disposal of its actions, each is to consider whether its situation warrants asking or granting anything on this head. Every nation has a right to ask of another that assistance and kind offices which it conceives itself to stand in need of. This it cannot be denied without injury. If the demand be unnecessary it is thereby guilty of a breach of duty; but herein it does not depend on the judgment of another. A nation has a right of asking, but not of requiring." Again, the same author remarks that these offices of humanity, "being due only in necessity, and by a nation which can comply with them without being wanting to itself; the nation which is applied to, has, on the other hand, a right of judging whether the case really demands them, and whether circumstances will allow it to grant them consistently with what is owing to its own safety and concerns. For instance, a nation is in want of corn, and makes a demand to purchase of another, this latter is to judge whether such a compliance will not expose itself to scarcity; and a denial is to be acquiesced in without resentment." (*Vattel, Droit des Gens*, liv. 2, ch. 1, § 9; *De Felice, Droit de la Nat., etc.*, tome 2, lec. 16; *Burlamaqui, Droit de la Nat. et des Gens*, tome 4, pt. 3, ch. 8; *Gardner, Institutes*, p. 682.)

§ 24. With respect to the rule and measure of the duties of nations to extend to others the offices of humanity and assistance, Vattel makes the following sensible and judicious remarks: "Melancholy experience shows that most nations mind only strengthening and enriching themselves, at the expense of others, or lording it over them, and even, if an opportunity offers, of oppressing and bringing them under the yoke. Prudence does not allow us to strengthen an enemy, or him in whom we discover a desire of plundering and oppressing us, and the care of our safety forbids it. We have seen that a nation does not owe its assistance and the offices of humanity to another any further than as they are reconcilable with the duties toward itself. Hence, it evidently follows, that though the universal law of mankind obliges us to grant, at all times, and to all, even to our enemies, those offices which are of a tendency to render them more moderate and virtuous, because no inconveniency is to be feared from such dispositions, yet we are not obliged to give them such succors as probably may be pernicious to ourselves. Thus, the exceeding importance of trade, not only to the wants and conveniences of life, but likewise to the forces of a state for furnishing it with the means of defending itself against its enemies, and the insatiable avidity of those nations which seek totally to engross it exclusive of others; thus, I say, these circumstances authorize a nation, possessed of a branch of trade, or the secret of some important manufacture or fabric, to reserve to itself those sources of wealth, and so far from communicating them, to take measures against it; but things necessary to the life or conveniency of others, this nation must sell them at a reasonable price, and not abuse its monopoly by iniquitous and hateful exactions. \* \* \* As to things more directly useful for war, a people is under no obligation of selling them to others of whom it has any well-grounded suspicion; and even prudence declares against it." (*Vattel, Droit des Gens*, liv. 2, ch. 1, § 16; *Cicero, de Officiis*, lib. 3, cap. 6; *De Felice, Droit de la Nat.*, etc., tome 2, lec. 16; *Burlamaqui, Droit de la Nat. et des Gens*, tome 4, pt. 3, ch. 3.)

§ 25. Nothing tends more to the peace of the world, and the general comity and intercourse of nations, than mutual

friendship and kind offices. The cultivation of international good-will and friendship is, therefore, one of the first and highest duties imposed upon every sovereign state. Rulers, however, are too apt to neglect this duty, and to seek to exalt their own patriotism by depreciating other countries, and inciting in their own people feelings of unkindness and hostility to their neighbors. Such conduct is very reprehensible, and its results are generally dangerous, if not disastrous. For the authorities of one state to abuse and depreciate the government of another, is a sure indication of weakness and want of civilization and refinement. National irritability is mentioned by Dymond as a most prominent cause of war. "It is assumed," he says, "not indeed upon the most rational grounds, that the best way of supporting the dignity, and maintaining the security of a nation, is, when occasions of disagreement arise, to assume a high attitude and a fearless tone. We keep ourselves in a state of irritability, which is continually alive to occasions of offense, and he that is prepared to be offended, readily finds offenses. \* \* \* So well, indeed, is national irritability known to be an efficient cause of war, that they who, from any motive, wish to promote it, endeavor to rouse the temper of a people by stimulating their passions, just as the boys in our streets stimulate two dogs to fight. These persons talk of insults, or the encroachments, or the contempts of the destined enemy, with every artifice of aggravation; they tell us of foreigners who want to trample upon our rights, of rivals who ridicule our power, of foes who will crush, and of tyrants who will enslave us. They pursue their object, certainly, by efficacious means; they desire war, and, therefore, irritate our passions; and when men are angry, they are easily persuaded to fight." (*Vattel, Droit des Gens*, liv. 2, ch. 1, §§ 11, 12; *Dymond, Essays on the Prin. of Morality*, essay 3, ch. 19; *De Felice, Droit de la Nat.*, etc., tome 2, lec. 16; *Burlamaqui, Droit de la Nat. et des Gens*, tome 4, pt. 3, ch. 3.)

## CHAPTER XII.

### SETTLEMENT OF INTERNATIONAL DISPUTES.

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§ 1. The precepts of morality, as well as the principles of public law, by which human society is governed, render it obligatory upon a state, before resorting to arms, to try every pacific mode of settling its disputes with others, whether such disputes arise from rights denied, or injuries received. This moderation is the more necessary, as it not unfrequently happens that what is at first looked upon as an

injury or an insult, is found, upon a more deliberate examination, to be a mistake rather than an act of malice, or one designed to give offense. Moreover, the injury may result from the acts of inferior persons, which may not receive the approbation of their own government. A little moderation and delay, in such cases, may bring to the offended party a just satisfaction; whereas, rash and precipitate measures often lead to the shedding of much innocent blood. The moderation of the government of the United States, in the case of the burning of the American steamboat "Caroline," in 1837, by a British officer, led to an amicable adjustment of the difficulties arising from a violation of neutral territory, and saved both countries from the disasters of a bloody war. The moderation of the British admiral, in the recent affair of San Juan Island, is deserving of the highest praise. (*Vattel, Droit des Gens*, liv. 2, ch. 18, §§ 323, et seq.; *Webster, Dip. and Off. Papers*, pp. 104, et seq.; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 8; *Burlamaqui, Droit de la Nat et des Gens*, tome 5. pt. 4, ch. 4; *President's Message*, Dec., 1859.)

§ 2. The different modes of terminating disputes between independent states, short of actual war, are divided into two classes: first, *amicable*, or measures taken *viâ amicitie*; and second, *forcible*, or measures taken *viâ facta*. The *amicable* modes or measures have been variously divided by publicists; the division most generally adopted is, into accommodation, compromise, mediation, arbitration, and conference. The *forcible* modes or measures are commonly known as retortion, retaliation, reprisal, seizure, and embargo. These divisions are, perhaps, not the most natural, nor are the lines of distinction between them always obvious or easily drawn. Nevertheless, as they have been adopted by writers of authority, and as these several terms are frequently used in works on international law, and require to be defined, we shall proceed to discuss each one separately. (*Vattel, Droit des Gens*, liv. 2, ch. 18, §§ 326, et seq.; *Wheaton, Elem. Int. Law*, pt. 4, ch. 1, § 1; *Phillimore, On Int. Law*, vol. 3, § 2; *Wildman, Int. Law*, vol. 1, ch. 5; *Polson, Law of Nations*, sec. 6; *Wolfius, Jus Gentium*, cap. 5; *Heffter, Droit International*, § 106; *Bello, Derecho Internacional*, pt. 1, cap. 11, § 1.)

§ 3. *Amicable accommodation* is where each party candidly examines the subject of dispute, with a sincere desire to preserve peace, by doing full justice to the other. In such cases, all doubtful points of etiquette will be yielded, and all uncertain and imaginary rights will be voluntarily renounced, in order to affect an amicable adjustment of differences. If no compromise of the right in dispute can be effected, the question will be avoided by the substitution of some other arrangement which may be mutually satisfactory. Such conduct is worthy of great and magnanimous nations; weaker states seldom act with so much moderation. An example of amicable accommodation is found in the adjustment, by the treaty of Washington, in 1842, of the differences between the United States and Great Britain, with respect to the right claimed by the latter to visit the vessels of the former in search for slavers on the coast of Africa. (*Vattel, Droit des Gens*, liv. 2, ch. 18, § 226; *Webster, Dip. and Off. Papers*, pp. 72, et seq.; *Wheaton, Hist. Law of Nations*, pp. 585, et seq.; *Heffter, Droit International*, § 107; *Bello, Derecho Internacional*, pt. 1, ch. 11, § 1; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 8.)

§ 4. *Compromise* is where the two parties, without attempting to decide upon the justice of their conflicting pretensions, agree to recede on both sides, and either to divide the thing in dispute, or to indemnify the claimant who surrenders his share to the other. As examples of compromise, we may refer to the negotiations terminating in the treaty of 1842, by which the Maine boundary question was satisfactorily adjusted, and to the negotiations terminating in the treaty of 1846, by which the Oregon difficulty was formally disposed of. Accommodation is a particular kind of compromise, and has therefore been deemed by some to be improperly classed as a distinct measure. (*Vattel, Droit des Gens*, liv. 2, ch. 18, § 327; *Webster, Dip. and Off. Papers*, p. 32, et. seq.; *U. S. Statutes at Large*, vol. 8, p. 582, etc.; *Heffter, Droit International*, § 109; *Bello, Derecho Internacional*, pt. 1, cap. 11, § 1; *Riquelme, Derecho Pub. Int.*, lib. 1. tit. 1. cap. 8.)

§ 5. *Mediation* is where a common friend interposes his good offices to bring the contending parties to a mutual



understanding. As this friend acts the part of a conciliator, rather than a judge, he may, while favoring the well-founded claims of one party, seek to induce him to relax something of his pretensions, if necessary, in order to secure peace. The mediator is essentially different from the arbitrator, although he frequently assumes the latter office also; he does not decide upon any of the matters in dispute, but merely seeks to reconcile conflicting opinions, and to moderate adverse pretensions. By thus calming the minds of the disputants, and disposing them to a reasonable accommodation or compromise, the mediator may often avert the evils and calamities of a resort to war. The task is a very delicate one, and the office of mediator requires great integrity and strict impartiality, for unless he possess these qualities in a pre-eminent degree, his efforts will not be likely to bring about the desired reconciliation of the disputants. Hubner deems it incumbent, upon neutrals generally, to act the part of mediators, in order to prevent, if possible, the breaking out of war. But Galiani is of opinion that, although the post of mediator may be accepted, the office is rather to be avoided than sought, on account of the danger to the mediator of compromising his neutrality. Phillimore prefers the christian principle of Hubner, to the more safe expediency of Galiani, but adds that "much must depend upon the subject of dispute, the character of the disputants, and upon the position and authority of the state which tenders the good offices." (*Vattel, Droit des Gens*, liv. 2, ch. 18, § 328; *Wheaton, Elem. Int. Law*, pt. 2, ch. 1, § 13; *Phillimore, On Int. Law*, vol. 3, § 4; *Hubner, De la Saisie des Batiments Neu.*, tome 1, pt. 1, ch. 2, § 11; *Galiani, de Doveri de Principi Neu.*, c. 9, p. 162; *Garden, de la Diplomatie*, tome 1, p. 436, note; *Heffter, Droit International*, § 109; *Bello, Derecho Internacional*, pt. 1, cap. 11, § 1; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 8; *Real, Science du Gouvernement*, tome 5, ch. 3, sec. 8.)

§ 6. *Arbitration* is where the decision of a dispute is left to arbitrators chosen by common agreement. If the contending parties have agreed to abide by the decision of these referees, they are bound to do so, except in cases where the award is obtained by collusion, or is not confined within the limits of the submission. It is usual to specify in the agreement to arbi-

trate, the exact questions which are to be decided by the arbitrators, and if they exceed these precise bounds, and pretend to decide upon other points than those submitted to them, their decision is in no respects binding. Thus, the award of the king of the Netherlands, on reference by treaty, in 1827, of the question of the northeastern boundary of the the United States, not being a decision of the question submitted to him, but a proposal for a compromise, was not regarded as binding either upon the United States or Great Britain, and was rejected by both, the dispute being afterward amicably settled by the parties themselves.

The following rules, mostly derived from the civil law, have been applied to international arbitrators, where not otherwise provided in the articles of reference. If there be an uneven number, the decision of a majority is conclusive. If there be only two, and they differ in opinion, they cannot call in a third as umpire. The arbitration is dissolved by the death of any one of the referees. A decision once formally delivered cannot be reconsidered without a new agreement, for, when the opinion is delivered, the arbitration is *functus officio*. The arbitrators do not guarantee the execution of their award, and have no power to enforce it. Where the question is territorial, they cannot determine the possession as distinguished from the right of property; for, by the law of nations, the right of property draws after it the right of possession, and the owner is not to be prejudiced by the possession of another, nor is the possessor to be disturbed in his possession till the question of ownership is determined. But this does not preclude the arbitrators from inquiring into all the circumstances of possession as part of the evidence of title. In other words, they must determine the question of ownership from which follows the right of possession, and not upon the latter as a right distinct from the the former. (*Vattel, Droit des Gens*, liv. 2, ch. 18, § 329; *Wheaton Elem. Int. Law*, pt. 2, ch. 1, § 13, note; *President's Annual Message*, 1831; *Am. Ann. Register*, 1830-1, p. 146; *Phillimore, On Int. Law*, vol. 3, § 3; *Voet, Com. ad Pandect*, lib. 4, t. 8; *Wildman, Int. Law*, vol. 1, p. 186; *Grotius. de Jur. Bel. ac Pac.*, lib. 3, cap. 20, § 48; *Puffendorf, de Jur. Nat. et Gent.*, lib. 5, cap. 13, § 6; *Heffler, Droit International*, § 109; *Bello*,

*Derecho Internacional*, pt. 1, cap. 11, § 1; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 8; *Burlamaqui, Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 4; *Real, Science du Gouvernement*, tome 5, ch. 3, sec. 8.)

§ 7. Offers to arbitrate are not always accepted, nor is the state declining the proposal bound to give any reasons in justification for rejecting the proposal of the other disputant, or the proffer of a third power to act as arbitrator. "It cannot," says Phillimore, "be laid down as a general and unqualified proposition, that it is the duty of states to adopt this mode of trial. There may, under the circumstances, be no third state willing, or qualified in all respects, for so arduous and invidious a task. Moreover, a state may feel that the contested right is one of vital importance, and one which she is not justified in submitting to the decision of any arbiter or arbiters." By refusing either to arbitrate, or to accept an offered arbiter, we do not justly incur the suspicion that our intentions are unreasonable or our demands exorbitant. Nevertheless, if the question is not one of vital or of very serious importance, and we refuse to resort to this or any other amicable mode of settlement, such suspicion will be most likely to arise. The refusal to accept the mediation of a third party, not acting as arbiter or judge, but simply as a conciliator, would very seldom be justifiable. (*Vattel, Droit des Gens*, liv. 2, ch. 18, § 329; *Wheaton, Elem. Int. Law*, pt. 2, ch. 1, § 13, note; *Phillimore, On Int. Law.*, vol. 3, § 3; *Bello, Derecho Internacional*, pt. 1, cap. 11, §§ 1, 2; *Heffter, Droit International*, § 109; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 8.)

§ 8. *Conferences and international congresses* have frequently been resorted to, where differences exist between several states, and they are willing to discuss them in a spirit of conciliation, in order to bring them to an amicable settlement. They are also often resorted to after the termination of a general war, for the purpose of discussing and settling questions growing out of the operations of the war, and not included in the stipulations of the treaty of peace. Other states than those who are parties to the dispute, being interested in the determination of the questions submitted, or at least in the

preservation of peace, are most usually invited to take part in these conferences. In order to afford a prospect of success in these deliberations, the plenipotentiaries sent to these congresses should be actuated by a sincere desire to effect a just and amicable settlement of the questions to be discussed. This, however, has not often been the case. The congresses of Cambray, in 1724, and of Soissons, in 1728, are characterized by Vattel as "dull farces played on the political theater, in which the principal actors were less desirous of producing an accommodation, than of appearing to desire it." Moreover, they have generally been under the control of the great European monarchical states and republics, or the smaller sovereignties have had very little weight in their deliberations. Thus, the congresses of Paris and Vienna, in 1814 and 1815, were mainly meetings of conquerors, for dividing among themselves the spoils of conquest, and for mutually agreeing among themselves to what extent each of the greater powers should be permitted to rob its weaker neighbors. "We know from history," says Phillimore, "that congresses of crowned heads have not always proved themselves to be impartial or competent tribunals of international law." For this reason, smaller states seldom willingly submit their disputes to the decision of such tribunals. The congress of Paris, in 1856, by the justice of its acts, somewhat redeemed the general reputation of European conventions of nations. The right of such bodies to *intervene* in the affairs of states, has been discussed in another place, and will again be alluded to in the chapter on the different kinds of wars. (*Vattel, Droit des Gens*, liv. 2, ch. 18, § 880; *Phillimore, On Int. Law*, vol. 1, § 398; vol. 2, § 3; *Vide Ante*, chapter iv., and *Post*, chapter xiv.; *Heffter, Droit International*, § 240; *Burlamaqui, Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 4.)

§ 9. *Retortion*, called by some amicable retaliation, and *retortion de droit*, is where one nation applies, in its transactions with the other, the same rule of conduct by which that other is governed under similar circumstances. Thus, if one state should make aggressive laws respecting the property, or trade, or personal rights of the citizens of another state, the latter may retort, by enacting similar laws against the citizens of the former. There is nothing in this contrary to

justice and sound policy, so long as it does not degenerate into cruel and barbarous treatment of private individuals. This kind of retaliation usually follows the breach of what are called imperfect obligations, and which do not justify a resort to forcible measures. (*Vattel, Droit des Gens*, liv. 2, ch. 18, § 341; *Wheaton, Elem. Int. Law*, pt. 4, ch. 1, § 1; *Martens, Precis du Droit des Gens*, § 254; *The Girolamo*, 3 *Hagg. Rep.*, p. 185; *Polson, Law of Nations*, sec. 6; *Phillimore, On Int. Law*, vol. 1, § 16; vol. 2, § 8; *Manning, Law of Nations*, p. 105; *Ortolan, Diplomatie de la Mer*, tome 1, ch. 16; *Garden, De Diplomatie*, liv. 6, § 3; *Rayneval, Inst. du Droit Nat.*, liv. 2, ch. 12; *Heffler, Droit International*, §§ 110, 111.)

§ 10. *Retaliation*, or, as it is sometimes called, vindictive retaliation, or *retorsio facti*, is where one state seeks to make another, or its citizens, suffer the same amount of evil which the latter has inflicted upon the former. Retaliation should be limited to such punishments as may be requisite for our own safety and the good of society; beyond this it cannot be justified. We have no right to mutilate the ambassador of a barbarous power, because his sovereign has treated our ambassador in that manner, nor to put prisoners and hostages to death, and to destroy private property, merely because our enemy has done this to us; for no individual is justly chargeable with the guilt of a personal crime for the acts of the community of which he is a member. Retaliation of this kind should be confined, as a general rule, to the individuals who have committed the violation of public law. There may be extraordinary cases which constitute an exception to this rule, but these must be judged according to the peculiar circumstances by which they are attended. "Instances of resolutions to retaliate on innocent prisoners of war," says Kent, "occurred in this country during the revolutionary war, as well as during that of 1812; but there was no instance in which retaliation, beyond the measure of secure confinement, took place in respect to prisoners of war." Vindictive retaliation is sometimes applied to the property of the offending state or individual, but such acts are usually of a belligerent character, and will be discussed in another place. (*Rutherford, Institutes*, b. 2, ch. 9, § 15; *Martens, Precis du Droit des Gens*, § 258, note; *Kent, Com. on Am. Law*,

vol. 1, pp. 93-94; *Journals of Congress under the Confed.*, vol. 2, p. 245; vol. 7, pp. 9-147; vol. 8, p. 10; *President's Messages*, Dec. 7th, 1813, and Oct. 28th, 1814; *Vattel, Droit des Gens*, liv. 2, ch. 18, § 339; *Manning, Law of Nations*, p. 105; *Ortolan, Diplomatie de la Mer*, liv. 1, ch. 16; *Garden, De Diplomatie*, liv. 6, § 3; *Rayneval, Inst. du Droit Nat.*, liv. 2, ch. 12; *Klüber, Droit des Gens Mod.*, § 234; *Heffter, Droit International*, §§ 110, 111; *Bello, Derecho Internacional*, pt. 1, cap. 11, § 3.)

§ 11. *Reprisals* are resorted to for the redress of injuries inflicted upon the state, in its collective capacity, or upon the rights of individuals to whom it owes protection in return for their allegiance. They consist in the forcible taking of things belonging to the offending state, or of its subjects, and holding them until a satisfactory reparation is made for the alleged injury. If the dispute is afterward arranged, the things thus taken by way of reprisal are restored, or, if confiscated and sold, are paid for with interest and damages; but if war should result, they are condemned and disposed of in the same manner as other captured property, taken as prize of war. As reprisals bring us to the awful confines of actual war, it is proper to inquire what kind of injuries, inflicted upon the state collectively, or upon its individual members, justify a resort to so dangerous a measure of redress. It is only in cases where justice has been *plainly denied*, or *most unreasonably delayed*, that a sovereign state can be justified in authorizing reprisals upon the property of another nation. Moreover, the delay must be of such a character as to render it tantamount to a denial of justice. Thus, if the claim be a national one, it must be properly demanded, and the demand refused. If it be of an individual, the claimant must first exhaust the legal remedies in the tribunals of the state from which the claim is due, and after an absolute denial of justice by such tribunals, his own government must make the demand of the sovereign authorities of the offending nation. Although the presumption of law is clearly in favor of the decisions of the lawfully constituted tribunals of a state, yet, if it is plain that justice has been administered partially, and in a different manner to the foreigner than to the subject, the government of the injured party may, notwithstanding such decision, demand justice, and if it be refused,

resort to reprisals. It was a doctrine of the Roman law, that an unjust sentence does not extinguish a just debt. Subjects must submit to the authority of the law, however great the injustice; but foreigners are under no such obligation, for their own state may, by force, compel the execution of justice on their behalf. In 1850, the British government authorized reprisals upon the Greeks for a claim of one *Pacifico*, a British subject, who had not first prosecuted it in the Greek tribunals. The protest of the Greek government, and the remonstrance addressed by Russia to the British government, contain a strong but dignified rebuke for an act so manifestly in violation of international law; moreover, the conduct of the British foreign minister, was censured by a large majority of the house of peers. The mediation of France effected an adjustment of the dispute, and the claim of *Pacifico*, for twenty-one thousand two hundred and ninety-five pounds one shilling and four pence, was referred to commissioners appointed for that purpose, who awarded to him the sum of one hundred and fifty pounds! What a paltry sum for a great nation to authorize reprisals upon a weaker state, and that, too, without first making the proper and legal demand! (*Vattel, Droit des Gens*, liv. 2, ch. 18, § 342; *Wheaton, Elem. Int. Law*, pt. 4, ch. 1, §§ 1, 2; *Kent, Com. on Am. Law*, vol. 1, pp. 60, 61; *Bynkershoek, Quest. Jur. Pub.*, lib. 1, cap. 24; *Emerigon, Traité des Assurances*, ch. 12, sec. 36; *Phillimore, On Int. Law*, vol. 3, §§ 8-24; *Grotius, de Jur. Bel. ac Pac.*, lib. 3, cap. 2, § 5; *British Annual Reg.*, 1850, vol. 92, pp. 281-286; *Hansard, Parl. Deb.*, 1850; *Ortolan, Diplomatie de la Mer.*, tome 1, ch. 16; *Manning, Law of Nations*, pp. 106-111; *Martens, Précis du Droit des Gens*, §§ 255-258; *Pistoye et Duverdy, Traité des Prises*, tit. 1, ch. 3, sec. 3; *Moser, Versuch, etc.*, b. 8, p. 504; *Heffter, Droit International*, §§ 110, 111; *Bello, Derecho Internacional*, pt. 1, cap. 11, § 3; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 8; *De Cussy, Droit, Maritime*, liv. 2, ch. 37.)

§ 12. Reprisals may be either *general* or *special*. They are *general* where one state awards to its subjects a general permission to seize the goods or persons of the offending nation upon the high seas, or wherever found without the jurisdiction of another state. They are *special* where such permis-

sion is limited to particular persons or things, or in time and place. Licenses, or letters of marque, to the injured persons, authorizing them to indemnify themselves upon the property of the subjects of the offending state, wherever found, have almost entirely fallen into disuse, and the term itself is now somewhat differently applied, the commissions issued to privateers in time of actual war, being ordinarily denominated *letters of marque*. These are not to be confounded with *letters of reprisal*. General permission to all the citizens of one state to make reprisals upon the property and persons of all citizens of another state, is little short of actual war, although considered, in international law, as without the pale of the rules applicable to war. The captors are not entitled to exercise the rights of war either toward the subjects of the offending state, or toward neutrals, nor are the persons, or goods captured, subject to the rules applicable to belligerent captures. Such matters are regulated by the law or authority authorizing the reprisals, and the acts of the parties making them are to be regulated and judged of by such law or authority, but they must, in no case, be in violation of the rules of international law which may be applicable. (*Wheaton, Elem. Int. Law*, pt. 4, ch. 1, § 2; *Kent, Com. on Am. Law*, vol. 1, pp. 94, 95; *Klüber, Droit des Gens Mod.*, § 234; *Bynkershoek, Quaest. Jur. Pub.*, lib. 1, cap. 24; *Polson, Law of Nations*, sec. 6; *Wildman, Int. Law*, vol. 1, p. 192; *Phillimore, On Int. Law*, vol. 3, §§ 8-24; *Duverdy et Pistoye, Traité des Prises*, tit. 1, ch. 3, sec. 3; *Manning, Law of Nations*, p. 115; *Heffler, Droit International*, §§ 110, 111; *Bello, Derecho Internacional*, pt. 1, cap. 11, § 3; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 12; *De Cussy, Droit Maritime*, liv. 1, tit. 2, § 51.)

§ 13. Another division of reprisals, made by writers on public law, is, into *positive* and *negative*, or, as termed by some writers, *active* and *passive*. Reprisals are *negative* when a state refuses to fulfil a perfect obligation which it has contracted, or to permit another nation to enjoy a right which it claims; they are *positive* when they consist in seizing the persons and effects belonging to the other nation, in order to obtain satisfaction. The same rule applies to both of these classes, that is, neither should be resorted to except



where the cause is manifestly just, and after all milder means have proved ineffectual. Negative reprisals, however, are, in general, less likely to produce an immediate rupture than those of a positive character. Nations are more ready to repel force than to employ it. (*Wheaton, Elem. Int. Law*, pt. 4, ch. 1, § 2; *Vattel, Droit des Gens*, liv. 1, ch. 18, §§ 342–346; *Klüber, Droit des Gens Mod.*, § 284, note; *Polson, Law of Nations*, sec. 6; *Phillimore, On Int. Law*, vol. 8, § 11; *Heffter, Droit International*, § 110; *Bello, Derecho Internacional*, pt. 1, cap. 11, § 3; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 12.)

§ 14. *Seizure* is a general term applicable to the forcible taking of the persons or property of others, and is applied alike to reprisals and belligerent captures made in war. But, in its more restricted sense, as applied to measures taken *vis à vis*, or forcible means of settling international disputes, the term is limited to taking forcible possession of the thing in dispute, or of the persons by whom the offense is committed. The seizure of the thing in controversy is generally regarded as the preliminary step toward the commencement of a war. It is, nevertheless, neither an actual nor a formal declaration of hostilities, and there is, therefore, still a possibility of a settlement of the dispute, before entering into a state of solemn and public war. In other words, it does not make the subjects of the two states public enemies, or give to either the rights of war, as against the other, or with respect to neutrals. If, however, war should immediately follow such seizure, it would be classed as a belligerent act in all its consequences. Thus, the seizure of San Juan island, in 1859, was, unquestionably, an act of hostility, but not, in its results, an act of war. (*Wheaton, Elem. Int. Law*, pt. 4, ch. 1, § 1; *Vattel, Droit des Gens*, liv. 2, ch. 18, § 887; *Polson, Law of Nations*, sec. 6; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 12; *President's Message*, Dec., 1859.)

§ 15. But before taking such forcible possession, it is necessary for us to prove clearly our right to the thing in dispute, and also that we have already tried the milder modes of adjustment, for other people are not obliged to respect that title any further than we show its validity, nor will they justify us in resorting to a measure of so much rigor, and one,

too, so likely to produce the most serious consequences to society, until we justify our conduct on the ground of its absolute necessity. The possessor may, therefore, remain in the possession till proof is adduced to convince him that his possession is unjust. "As long as that remains undone," says Vattel, "he has a right to maintain himself in it, and even to recover it by force, if he has been despoiled of it. Consequently, it is not allowable to take up arms in order to obtain possession of a thing to which the claimant has but an uncertain or doubtful right. He is only justifiable in compelling the possessor, by force of arms, if necessary, to come to a discussion of the question, to accede to some reasonable mode of decision or accommodation, or, finally, to settle the point by articles of agreement upon an equitable footing." And where the title to the thing seized seems indisputable, to attempt to gain forcible possession against the actual occupant, without first resorting to the milder modes of adjustment, is equally as objectionable as it would be to declare war, under the same circumstances. Indeed, it may be regarded as even more objectionable, for the reason that such seizures are sometimes made by subordinate authorities, without consulting the war-making power of the state. (*Vattel, Droit des Gens*, liv. 2, ch. 18, § 337; *Wheaton, Elem. Int. Law*, pt. 4, ch. 1, § 2; *De Cussy, Droit Maritime*, liv. 2, ch. 37; *Garden, De Diplomatie*, liv. 6, § 2.)

§ 16. It is a well settled principle of international law, that reprisals, strictly speaking, affect the *persons* as well as the *property* of the subjects of the government against which they are granted; but, in modern times, they have been chiefly confined to *goods*. In executing the right of reprisal upon vessels, the persons of the commanders and crews are necessarily affected, although it is usual to release them immediately on bringing into port the vessel taken by way of reprisal. Nevertheless, the right of reprisal, extends also to all persons of the offending nation. Vattel very justly remarks that "as we may seize the things which belong to a nation in order to compel it to do us justice, we may equally, for the same reason, arrest some of its citizens and retain them till we receive full satisfaction. This is what the Greeks called *Androlepsia*." The practice of ancient times, in this respect,

is not often followed by modern civilized nations, except by way of retaliation, or in the case of taking vessels on the high seas, in the manner already alluded to. It is proper to remark that while all subjects of the injuring government are liable to reprisals, whether they be native, naturalized, or domiciled, travelers and passing guests are, in general, excepted from such liability. (*Vattel, Droit des Gens*, liv. 2, ch. 18, § 351; *Rutherford, Institutes*, b. 2, ch. 9, § 13; *Phillimore on Int. Law*, vol. 3, § 19; *Grotius, de Jur. Bel. ac Pac.*, lib. 3, cap. 2, § 7; *Bynkershoek, Quaest. Jur. Pub.* lib., 1, cap. 24; *Heffter, Droit, International*, § 110; *De Cussy, Droit, Maritime*, liv. 1, tit. 2, § 51; *Wildman, Int. Law*, vol. 1, p. 192; *Le Louis*, 2 Dod. Rep., p. 245.)

§ 17. But the seizure and punishment of the individuals offending, is an act not unusual on the part of the offended state. Where such persons are found within the jurisdiction of the state, and they are duly tried and condemned by the lawfully constituted tribunals of the country, the act is nothing more than the ordinary and legitimate exercise of the authority of sovereign and independent states. But such offenders are sometimes seized upon the high seas, or elsewhere beyond the jurisdiction of the offended nation, an exercise of force which is justifiable only in case of offenses most manifest and palpable, and where the government of the offender plainly refuses, or most unreasonably delays, to inflict punishment, to surrender the criminal, or to afford satisfaction. Such forcible seizure beyond the jurisdiction of the state, is an act, not of war, but in violation of pacific international rights, and is sometimes followed by war, although more usually by a demand for explanation and satisfaction. And such diplomatic discussion, if properly conducted, will generally lead to an arrangement both of the original offense and of the consequent forcible seizure. The act, however, is, in its character, hostile. (*Ortolan, Diplomatic de la Mer*, liv. 2, ch. 16; *Vattel, Droit, des Gens*, liv. 2, ch. 18, § 350; *Rutherford, Institutes*, b. 2, ch. 9, § 13; *Vide Ante*, chapter vii.)

§ 18. In case the government of the offending individuals should assume the responsibility of their acts, the question arises, whether the seizing and holding of the individuals for punishment, under the municipal laws of a state, is justi-

fied by the law of nations, or whether such a proceeding is to be regarded as a reprisal or forcible seizure, hostile in its nature, and which, without explanation or satisfaction, might justify retaliation or war. The question is one of the highest importance, as its determination may lead to the most serious results. There seems to have been, at one time, a difference of opinion on this subject in the United States, and a conflict of jurisdiction, as claimed by the federal authorities and state tribunals. All difficulties, however, were afterward removed by the act of congress passed August 29th, 1842, directing the discharge of any subjects or citizens of a foreign state, and domiciled therein, confined, or in custody for any act done or omitted under the authority of a foreign state or sovereignty, the validity or effect whereof depend upon the law of nations. (*Webster, The Works of*, vol. 6, pp. 247–270; *Brightly, Digest of Laws of U. S.*, p. 302; *Dunlop, Digest of Laws of U. S.*, p. 1014; *U. S. Statutes at Large*, vol. 5, p. 539.)

§ 19. The case which gave rise to this difficulty, and to the subsequent act of congress, was that of Alexander McLeod, who was indicted, in 1841, for the burning of the steamboat “*Caroline*,” and the killing of one Amos Durfee, in effecting the capture of that steamboat within the jurisdiction of the state of New York, in December, 1837. The responsibility of McLeod’s acts was assumed by the British government, as having been done by its authority and under its protection, McLeod having acted as an officer of that government, and under the orders of his superiors. This was one of the grounds on which the discharge of McLeod from custody was demanded. The case was argued at great length and with distinguished ability on both sides, and the decision, it was thought, would determine the question of peace or war between the United States and Great Britain. (*The People v. McLeod*, 25 *Wendell Rep.*, p. 483; *Webster, Dip. and Off. Papers*, pp. 120–149; *Webster, The Works of*, vol. 6, pp. 247–270; *Phillimore, Letter to Lord Ashburton*, 1842, pp. 27, 183.)

§ 20. The supreme court of the state of New York held that a subject of a foreign state was liable to be proceeded against *individually*, and tried on an indictment in the crimi-

nal courts for *arson* and *murder*, notwithstanding the acts for which the indictment was made had been subsequently avowed by his government, and it, consequently, refused to discharge him from custody. The opinion of the court was delivered by Mr. Justice Cowen, and is of great length. So far as the question of national law is concerned, the opinion rests upon the proposition, that till war is declared by the war-making power, the officers or citizens of a foreign government, who enter our territory, are as completely obnoxious to punishment by our law as if they had been born and always resided in this country; that while two nations are at peace with each other, the acts of hostility by individuals must be regarded as *private*, and not *public* acts, and that the courts will hold the parties *individually* responsible, notwithstanding the avowal of such acts by their government. (*The People v. McLeod*, 25 *Wendell Rep.*, pp. 488, et seq.; *Annual Register*, 1841, vol. 8, pp. 310, et seq.; *Phillimore, On Int. Law*, vol. 3, § 38.)

§ 21. Mr. Webster, the American secretary of state, in his correspondence with Mr. Fox, the British minister, said that "The government of the United States entertains no doubt that, after the avowal of the transaction as a public transaction, authorized and undertaken by the British authorities, individuals concerned in it ought not, by the principles of public law and the general usage of civilized states, to be holden personally responsible in the ordinary tribunals of law for their participation in it. And the President presumes that it can hardly be necessary to say that the American people, not distrustful of their ability to redress public wrongs by public means, cannot desire the punishment of individuals when the act complained of is declared to have been an act of government itself. \* \* \* The indictment against McLeod is pending in a state court, but his rights, whatever they may be, are no less safe, it is to be presumed, than if he were holden to answer in one of the courts of this government. He demands impunity from personal responsibility, by virtue of the law of nations, and that law, in civilized states, is to be respected in all courts." On an other occasion, he spoke of the opinion of Mr. Justice Cowen, as "not entitled to be called a respectable opinion." (*Webster, Dip. and Off. Papers*, p. 126.)

§ 22. As McLeod was *acquitted* on the trial, there was no opportunity to obtain, by appeal to the federal courts, an opinion of the highest tribunal of the United States on this important question, and the subsequent act of congress has obviated all danger of the recurrence of a similar case. The opinion of Mr. Justice Cowen, however, seems not to have received the approbation of the best judicial minds of his own state, and to have been very generally condemned in other states, and by the political authorities of the federal government. It can, therefore, hardly be regarded as an authoritative exposition of the principles of international law, however sound its interpretation of the statutes of his own state may be regarded by the courts of that state. Moreover, opinions and decisions of state courts are not deemed of binding authority in questions of international law, even where supported by sound reasons, the federal courts alone having jurisdiction of questions of that nature. (*Webster, Dip. and Off. Papers*, p. 137; *Tallmadge, Review, etc.*, 26 *Wendell, Rep. app.*, p. 663; *Brightly, Digest of Laws of U. S.*, p. 302; *Dunlop, Digest of Laws of U. S.*, p. 1014; *U. S. Statutes at Large*, vol. 5, p. 539.)

§ 23. Mr. Lee, the third attorney-general of the United States, says: "It is as well settled in the United States as in Great Britain that a person, acting under a commission from the sovereign of a foreign nation, is not amenable for what he does, in pursuance of his commission, to any judiciary tribunal of the United States." Judge Story, in speaking of the seizure of an American vessel and cargo by a Spanish vessel, said, that if she had a commission, it was an act of the Spanish government; and if she had no commission, but the act was *adopted and acknowledged by the crown, or its competent authorities*, the seizure must be considered as for the benefit of the crown, and the property, when condemned, becomes a *droit* of the government. This view of the question is supported by the opinions of chancellor Kent, chief justice Spencer, and judge Tallmadge, of New York; chief justice Gibson, of Pennsylvania; Professor Greenleaf, of Harvard University, and numerous other distinguished jurists of the United States. (*Lee, Opinions of U. S. Att'ys Gen'l.*, vol. 1, p. 81; *Carrington, et al. v. C. Ins. Co.*, 8 *Peters, Rep.*, p.

522; *Tallmadge, Review, etc.*, 26 *Wendell, Rep.*, app., p. 674.)

§ 24. Among European writers on public law, there seems to be a very general unanimity of opinion. Vattel says, that "on all occasion susceptible of doubt, the whole nation, the individuals, and especially the military, are to submit their judgement to those who hold the reins of government." The sovereign alone is to be held guilty for the acts of unlawful war; that he alone is bound to repair the injuries, and not those who act under his authority. "The subjects, and in particular the military, are innocent, they have acted only from a necessary obedience." Rutherforth says, that even in an imperfect sort of war, "what the members do, who act under the particular direction and authority of their nation, is, by the law of nations, no personal crime in them; they cannot, therefore, be punished, consistently with this law, for any act in which it considers them only as the instruments, and the nation as the agent." Burlamaqui says, that the mere presumption of the will of the sovereign, will not be sufficient to excuse a governor, or any other officer to commit acts of war. But if the sovereign ratify such acts, this approbation reflects back the authority of the sovereign upon the acts, and so obliges the whole commonwealth. (*Vattel, Droit des Gens.*, liv. 3. ch. 2, § 187; *Rutherforth, Institutes*, b. 2, ch. 9, § 18; *Burlamaqui, Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 3, §§ 18, 19; *Tallmadge, Review, etc.*, 26 *Wendell, Rep.*, app., pp. 663, et seq.; *Phillimore On Int. Law*, vol. 3, § 38; *Thorshaven and its Dep.*, 1 *Edw. Rep.*, p. 102.)

§ 25. An embargo is a species of reprisal upon the property of the offending nation, found within the territory of the injured state, by prohibiting the departure of vessels, or the removal of goods. An embargo may, or may not be, followed by the sequestration of the goods and property detained. If war follows, it is said to have a retroactive effect, and the detained goods are considered as the property of enemies taken in war. But if the difficulty which led to the embargo is amicably arranged, they are released upon the terms which the parties may stipulate in such arrangement. In maritime embargoes, persons as well as goods are usually seized and retained, to be subsequently released, or treated as prisoners of war, according as the embargo results in peace

or solemn war. An embargo is more usually resorted to in contemplation of hostilities, than as a mode of settling disputes between states. It is, therefore, classed by Phillimore as a measure of redress, "midway between reprisals and war." (*Phillimore, On Int. Law*, vol. 8, §§ 24–26; *Wheaton, Elem. Int. Law*, pt. 4, ch. 1, §§ 1, 2; *Emerigon, Traité des Assurances*, ch. 12, sec. 35; *Valin, Traité des Reprises*, liv. 3, tit. 10; *The Theresa Bonita*, 4 *Rob. Rep.*, p. 245; *The Boedes Lust*, 5 *Rob. Rep.*, p. 245; *Manning, Law of Nations*, p. 105; *Ortolan, Diplomatie de la Mer.*, liv. 2, ch. 16; *Rayneval, Inst. du Droit Nat.*, liv. 2, ch. 12; *Bello, Derecho Internacional*, pt. 1, ch. 11, § 3; *Heffter, Droit International*, § 112; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 12.)

§ 26. The resort to reprisals, seizures, or embargoes, or forcible means of redress between nations, may assume the character of war, in case they fail to produce the satisfaction demanded of the offending state. Such acts, as already remarked, not being positive acts of war, the effects seized are not usually condemned till the question of peace or war is finally decided. If peace should be continued, they are restored, but if war follows, they are confiscated. "Reprisals," says Vattel, "are used between nation and nation, in order to do themselves justice when they cannot otherwise obtain it. If a nation has taken possession of what belongs to another; if it refuses to pay a debt, or repair an injury, or to make a just satisfaction, the latter may seize what belongs to the former, and apply it to its own advantage, till it obtains full payment for what is due, together with interest and damages; or keep it as a pledge till the offending nation has made ample satisfaction. The effects thus seized are preserved, while there is any hope of obtaining satisfaction or justice. As soon as that hope disappears, they are confiscated, and then the reprisals are accomplished. If the two nations, upon this ground of quarrel, come to an open rupture, satisfaction is considered as refused from the moment that the war is declared, or hostilities commenced; and then, also, the effects seized may be confiscated." These remarks are more particularly applicable to *general* reprisals, although, even then, sequestration sometimes immediately follows the seizure. Where such extreme measures are



resorted to it is not easy to distinguish between them and actual hostilities. But in *special* reprisals, made for the indemnification of injuries upon individuals, and limited to particular places and things, immediate confiscation is more frequently resorted to. Thus, Cromwell having made a demand on Cardinal Mazarin, during the minority of Louis XIV., for indemnity to a Quaker, whose vessel had been illegally seized and confiscated on the coast of France, and receiving no reply within the three days specified in the demand, dispatched two ships of war to make prize of French vessels in the channel. The vessels were seized and sold, the Quaker paid out of the proceeds the value of his loss, and the French ambassador apprised that the residue was at his service. This substantial act of justice caused neither reclamation nor war. (*Vattel, Droit des Gens*, liv. 2, ch. 18, § 342; *Wheaton, Elem. Int. Law*, pt. 4, ch. 1, § 3; *Kent, Com. on Am. Law*, vol. 1, pp. 60, 61; *Chitty, Com. Law*, vol. 1, pp. 418-423; *Phillimore, On Int. Law*, vol. 3, § 21; *Villemain, Histoire de Cromwell*, tome 2, pp. 236, 237; *Ortolan, Dip. de la Mer.*, liv. 2, ch. 16; *Duer, On Insurance*, pp. 441-444; *The Diana*, 5 *Rob. Rep.*, p. 60; *De Cussy, Droit Maritime*, liv. 1, tit. 2, § 51.)

§ 27. When an embargo was laid on Dutch property in the ports of Great Britain, on the rupture of the peace of Amiens, in 1803, Sir William Scott announced the law applicable to such cases, as follows: "The seizure was at first equivocal, and if the matter in dispute had terminated in reconciliation, the seizure would have been converted into a civil embargo, and so terminated. Such would have been the retroactive effect of that course of circumstances. On the contrary, if the transaction end in hostility, the retroactive effect is exactly the other way. It impresses the direct hostile character upon the original seizure; it is declared to be no embargo; it is no longer an equivocal act, subject to two interpretations; there is a declaration of the *animus* by which it is done; that it was done *hostili animo*, and it is to be considered as a hostile measure, *ab initio*, against persons guilty of injuries which they refuse to redeem by any amicable alteration of their measures. This is the necessary course, if no compact intervenes for the restoration of such property, taken before a formal declaration of hostilities." (*Wheaton, Elem.*

*Int. Law*, pt. 4, ch. 1, § 4; *The Boedes Lust.*, 5 *Rob. Rep.*, p. 246; *Duer, On Insurance*, vol. 1, pp. 441, et seq.; *The Diana*, 5 *Rob. Rep.*, p. 60; *Phillimore, On Int. Law*, vol. 3, § 21; *De Cussy, Droit Maritime*, liv. 1, tit. 2, § 51; liv. 2, ch. 27.)

§ 28. The right of granting reprisals, or of authorizing seizures and embargoes, is vested in the sovereign, or supreme power of the state. It being little short of the right to carry on war, it is usually conferred only by the war-making power of the state. This, however, is regulated by municipal law. The English statute (4 Henry V., cap. 7,) declared that "the king will grant marque in due form to all that feel themselves grieved." The marine ordinance of Louis XIV., of 1681, described the form to be observed in issuing letters of marque to French subjects. But these special reprisals, in time of peace, as has been already said, have almost entirely fallen into disuse. In case of general reprisals, the state duly authorizes its officers and subjects by commissions, or by some general law or decree. Without such authority previously given, or its exercise subsequently ratified, by the supreme authority of the state, reprisals or seizures are not justified by the law of nations. (*Kent, Com. on Am. Law*, vol. 1, pp. 61, 62; *Valin, Commentaries*, tome 2, tit. 10, pp. 414, 416; *Wheaton, Elem. Int. Law*, pt. 4, ch. 1, § 5; *Bynkershoek, Quaest. Jur. Pub.*, lib. 1, cap. 24; *Vattel, Droit des Gens*, liv. 2, ch. 18, §§ 342–346; *Martens, Precis du Droit des Gens*, liv. 8, ch. 2, § 260; *Emerigon, Traité des Assurances*, ch. 12, sec. 35; *Phillimore, On Int. Law*, vol. 3, § 18; *Wildman, Int. Law*, vol. 1, p. 191; *Bouchaud, Theorie des Traités de Commerce*, ch. 13, § 4; *Rayneval, Inst. du Droit de la Nat., etc.*, lib. 2, ch. 12; *Heffter, Droit International*, § 110; *Bello, Derecho Internacional*, pt. 1, ch. 11, § 8.)

§ 29. A state may authorize seizures and reprisals in favor of its own citizens, and for the redress of its own grievances, but not in favor of foreigners, or in an affair in which the nation has no concern. In 1662, England granted reprisals against the United Provinces in favor of the knights of Malta. On this subject the grand pensionary, De Witt, protested, saying: "It is evident that no sovereign can grant or make reprisals, except for the defense or indemnification of his own subjects, whom he is, in the sight of God, bound to

protect; but he never can grant reprisals in favor of a foreigner who is not under his protection, and with whose sovereign he has not an engagement to that effect, *expacto vel foedere*. Besides, it is certain that reprisals cannot be granted except in case of an open denial of justice. Finally, it is also evident, that, even in case of a denial of justice, he cannot empower his subjects to make reprisals until he has repeatedly demanded justice for them, and added, that in the event of a refusal, he will be obliged to grant them letters of marque and reprisal." The court of France strongly condemned the conduct of the British admiralty in this case, and the king of England himself testified his disapprobation of it, and gave orders for the release of the Dutch vessels which had been seized by way of reprisal. (*Vattel, Droit des Gens*, liv. 2, ch. 18, § 348; *Bynkershoek, de Foro Legat.*, cap. 22, § 5; *Bynkershoek, Quaest. Jur. Pub.*, lib. 1, cap. 24; *Valin, Com. sur l'Ord.*, 1, 3, tit. 10, *Représailles*; *Phillimore, On Int. Law*, vol. 3, § 16; *Wildman, Int. Law*, vol. 1, p. 191; *Manning, Law of Nations*, p. 110; *Garden, De Diplomatie*, liv. 6, sec. 3, § 2.)

§ 30. Valin is of opinion that the exception of foreigners does not apply to aliens domiciled in the country, (*regnicola*,) the state being bound to protect them, and to consider an injury done to them as an affront to its own sovereignty. Letters of reprisal may, therefore, issue not only to a subject, by birth or naturalization, but also to a foreigner domiciled in the country. This might be inferred from the rule of international law, which subjects the property of domiciled aliens to all the contingencies of the war, they being considered, in law, as the subjects of the state in which they are domiciled. Being themselves liable to reprisals against the country of their domicile, it would seem just that they be allowed to participate in their benefits. (*Valin, Traité des Prises*, p. 225; *Duponceau, Translation of Bynkershoek*, note, p. 184; *Phillimore, On Int. Law*, vol. 3, § 16; *Valin, Ord. de la M.*, 1, 3, tit. 10, *des Représailles*; *Garden, De Diplomatie*, liv. 6, sec. 3, § 2.)

## CHAPTER XIII.

### JUST CAUSES OF WAR.

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§ 1. "Whoever," says Vattel, "entertains a true idea of war,—whoever considers its terrible effects, its destructive and unhappy consequences, will readily agree that it should never be undertaken without the most cogent reasons. Humanity revolts against a sovereign who, without necessity, or without very powerful reasons, lavishes the blood of his most

faithful subjects, and exposes his people to the calamities of war, when he has it in his power to maintain them in the enjoyment of an honorable and salutary peace. And if to this imprudence, this want of love for his people, he moreover adds injustice toward those he attacks, of how great a crime, or rather of what a series of crimes, does he not become guilty? Responsible for all the misfortunes which he draws down upon his subjects, he is, moreover, loaded with the guilt of all those which he inflicts on an innocent nation. The slaughter of men, the pillage of cities, the devastation of provinces—such is the black catalogue of his enormities. He is responsible to God, and accountable to human nature, for every individual that is killed, for every hut that is burned down. The violences, the crimes, the disorders of every kind, attendant on the tumult and licentiousness of war, pollute his conscience, and are set down to his account, as he is the original author of them all. Unquestionable truths! alarming ideas! which ought to affect the rulers of nations, and all their military enterprises, inspire them with a degree of circumspection proportionate to the importance of the subject!" The foregoing words of Vattel, remarkable for the age in which they were written, are well worthy the consideration and study of the statesmen and rulers of our own time. (*Vattel, Droit des Gens*, liv. 3, ch. 3, § 24; *Manning, Law of Nations*, p. 96; *Garden, De Diplomatie*, liv. 6, § 5; *Rayneval, Inst. du Droit Nat.*, liv. 3, ch. 1; *Bello, Derecho Internacional*, pt. 2, cap. 1, § 3; *De Felice, Droit de la Nat.*, etc., tome 2, lec. 21; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 7; *Real, Science du Gouvernement*, tome 5, ch. 2, sec. 2, § 1.)

§ 2. The reasons which determine a nation to undertake a war, are divided, by publicists, into two distinct classes: those which relate to the *right* to make the war, and those which relate to the *expediency* or propriety of doing so. The former are called the *causes* of the war, and the latter the *motives*; these causes may be *justifiable* or *unjustifiable*, and the motives may be *commendable* or *vicious*. The distinction has not always been observed by publicists and historians, and we not unfrequently find reasons alleged as *causes* of a war which were only *motives* or mere *pretexts* for undertaking it. (*Paley, Moral and Pol. Philosophy*, b. 6, ch. 12; *Vattel, Droit, des Gens*,

liv. 3, ch. 3, §§ 25, 26; *Grotius, de Jur. Bel. ac Pac.*, lib. 2, caps. 1, et. seq; *Burlamaqui, Droits de la Nat. et des Gens*, tome 5, pt. 4, ch. 2; *Rozneval, Inst. du Droit Nat.*, liv. 3 ch. 1; *Bello, Derecho Internacional*, pt. 2, cap. 1, § 3; *De Felice, Droit de la Nat., etc.*, tome 2, lec. 21; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 7.)

§ 3. The *justifiable causes* of a war are injuries received or threatened. There must be a strong probability that the threat may be attempted to be carried into execution, as mere empty words will seldom justify us in declaring war. It is not necessary that the injury should be material or physical, as a national insult is often as injurious as the robbery of a province. The justifiable objects of a war may, therefore, be divided into three classes or sub-divisions: 1st, To secure what belongs or is due to us; 2d, To provide for our future safety by obtaining reparation for injuries done to us, and 3d, To protect ourselves and property from a threatened injury. We will consider each of these classes separately. (*Puley, Moral and Pol. Philosophy*, b. 6, ch. 12; *Vattel, Droit des Gens*, liv. 3, ch. 3, § 25; *Grotius, de Jur. Bel. ac Pac.*, lib. 2, cap. 1, § 1; *Phillimore, on Int. Law*, vol. 3, § 49; *Garden, de Diplomatie*, liv. 6, § 5; *Bello, Derecho Internacional*, pt. 2, cap. 1, § 3; *De Felice, Droit de la Nat., etc.*, tome 2, lec. 21, *Real, Science du Gouvernement*, tome 5, ch. 2, sec. 2, § 6.)

§ 4. *First*, of wars undertaken to secure what belongs or is due to us. We have shown, in the preceding chapter, that the party in possession has a right to retain his possession till the other claimant shows a clear and valid title to the thing in dispute; and if, before proving such title, he should attempt to oust the actual possessor by force, the latter may employ force to resist the attack. So, if the latter be removed from his possession by fraud or surprise, or violence, he may employ force to recover it; but if the former shows a clear and valid title to the thing in dispute, and has first resorted to the amicable modes of settling the question upon an equitable footing, and has been refused all reasonable modes of adjustment, he may be justifiable in resorting to force for the recovery of what really and truly belongs to him, and is unjustly withheld by his opponent. The burthen of proof, in such cases, rests upon the party who makes the seizure or

attack, and he is bound to show, not only that the thing seized is clearly and indisputably his, but, also, that all amicable modes of recovery, or adjustment, had been tried without effect; in fine, that justice had been absolutely denied him, and could be obtained only by a resort to war. (*De Felice, Droit, de la Nat., etc.*, tome 2, lec. 21; *Vattel, Droit des Gens*, liv. 2, ch. 18, § 337; *Grotius, de Jur. Bel. ac Pac.*, lib. 2, cap. 1, §§ 2, et seq.; *Burlamaqui, Droit, de la Nat. et des Gens*, tome 5, pt. 4, ch. 2; *Real, Science du Gouvernement*, tome 5, ch. 2, sec. 2, § 6.)

§ 5. *Second*, of wars undertaken to provide for our future safety, by obtaining a reparation of injuries done to us. We have stated, in a former chapter, that a sovereign state is not liable to *punishment* in the strict technical sense of that term; but, that where one state is injured or insulted by another, the former may require not only indemnity for the past, but security for the future, by making war upon the aggressor. This is regarded, in ordinary language, as a *punishment* for the offenses committed, and is intended to prevent their recurrence. But, in public law, it is considered in the light of a reparation of injuries received, and as an act of self-defense in providing for future security. A war, undertaken for such a cause, must be limited to the object in view; beyond this, it is unjustifiable. It is proper to remark here, that injuries done to a citizen of the state, is an injury to the whole state, for it is the duty of every state to maintain the security and welfare of all its citizens, and this obligation gives to it the right to make war upon any one from whose unlawful conduct they have suffered injuries, which the aggressor refuses to repair. (*Grotius, de Jur. Bel. ac Pac.*, lib. 2, cap. 20, § 38; *Vattel, Droit des Gens*, liv. 3, ch. 3, § 41; *Rutherford, Institutes*, b. 2, ch. 9, § 11; *Phillimore, On Int. Law*, vol. 3, § 37; *Garden, De Diplomatie*, liv. 6, § 5; *De Felice, Droit de la Nat., etc.*, tome 2, lec. 21; *Real, Science du Gouvernement*, tome 5, ch. 2, sec. 2, § 6.)

§ 6. *Third*, of wars undertaken to protect ourselves and property from a threatened injury. Self-defense is not limited to the repelling of unjust violence; if it be seriously threatened, we may resort to such forcible measures as may be necessary to prevent its occurrence. It is not required of a state that

it wait till an injury is actually received, and then make war to obtain reparation; it is its duty to provide against the threatened danger, by making war, if needs be, upon the threatening party, in order to deprive him of the means of inflicting the injury. (*Paley, Moral and Pol. Philosophy*, b. 6, ch. 12; *Vattel, Droit des Gens*, liv. 3, ch. 3, § 44; *Rutherford, Institutes*, b. 2, ch. 9, § 11; *Phillimore, On Int. Law*, vol. 3, § 37; *Bello, Derecho Internacional*, pt. 2, cap. 1, § 3; *De Felice, Droit de la Nat., etc.*, tome 2, lec. 21; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 7; *Rayneval, Ins. de la Nat., etc.*, liv. 3, ch. 1, § 2; *Real, Science du Gouvernement*, tome 5, ch. 2, sec. 2, § 6.)

§ 7. The causes of war are sometimes of such a mixed character that it is difficult to distinguish between what is justifiable and what is not. As already stated, a war which is offensive in its military character, may, or may not, be for justifiable causes, according to the necessities of the case; for, as both nature and morality forbid our resorting to physical force to redress our wrongs, till we have tried the milder modes of procuring justice, without success, all the circumstances of each particular case must be taken into consideration before we can fully determine the character of the causes which induce the undertaking of such a war. Sometimes, however, the cause is single, and its character may be determined directly and without relation to the attending circumstances, or to the measures previously resorted to in order to obtain satisfaction. (*Vattel, Droit des Gens*, liv. 3, ch. 3, §§ 37, 38; *Leiber, Political Ethics*, b. 7, ch. 3, § 23; *Manning, Law of Nations*, p. 96; *Bello, Derecho Internacional*, pt. 2, cap. 1, § 3; *De Felice, Droit de la Nat., etc.*, tome 2, lec. 21.)

§ 8. Of this class, are wars undertaken simply for the purpose of weakening another state, whose power, if allowed to increase, we have good reason to believe, will be used to our injury. Here the question arises, how serious must be the danger to our own safety to constitute a justifiable cause for our taking up arms to prevent the aggrandizement of a neighbor? This question is discussed, at considerable length, and with great clearness, by Vattel. "On the one hand," he says, "a state that increases her power by all the arts of good government, does no more than what is commendable,



she fulfils her duties toward herself, without violating those which she owes to other nations. The sovereign, who, by inheritance, by free election, or by any other just and honorable means, enlarges his dominions by the addition of new provinces, or entire kingdoms, only makes use of his right without injuring any person. How then can it be lawful to attack a state which, for its aggrandizement, makes use only of lawful means? \* \* On the other hand, it is but too well known, from sad and uniform experience, that predominating powers seldom fail to molest their neighbors, to oppress them, and even totally subjugate them, whenever an opportunity occurs, and they can do it with impunity. Europe was on the point of falling into servitude for want of a timely opposition to the growing fortune of Charles V. Is the danger to be waited for? Are we to allow the aggrandizement of a neighbor, and quietly wait till he makes his preparations to enslave us? Will it be a time to defend ourselves when we are deprived of the means? Prudence is a duty incumbent on all men, and most pointedly so on the heads of nations as being commissioned to watch over the safety of the whole people." Having thus stated both sides of the question, he proceeds to give us the following solution. Since war is justifiable only where we have actually suffered an injury, or are visibly threatened with one, the increase of power in a neighbor cannot, alone and of itself, give us a right, under the law of nations, to take up arms in order to oppose it. But power alone does not threaten an injury, it must be accompanied by the will to do an injury, and that will must be clearly manifested, before we can resort to so terrible an expedient. If the state, receiving a formidable accession of power, has given proofs of injustice, rapacity, pride, ambition, or an imperious thirst of rule, she becomes an object of just suspicion to her neighbors, whose duty it is to stand on their guard against her. Moreover, they may demand securities, and if she refuses to give any, this may constitute additional evidence that she meditates injury. And when this design is *clearly and unmistakably* manifest, and all other modes of warding off the threatened danger fail, war becomes inevitable. (*De Felice, Droit de la Nat., etc., tome 2, lec. 21; Vattel, Droit des Gens, liv. 3, ch. 3, §§ 42-49; Grotius,*

*de Jur. Bel. ac Pac.*, lib. 2, caps. 22–25; *Rutherford, Institutes*, b. 2, ch. 9, § 11.)

§ 9. Grotius not only declares, as unjustifiable, a war undertaken through a “fear of our neighbor’s increasing strength,” without a moral certainty that such strength will be used to our injury, but is of opinion that, in all dubious questions, we are bound to resort to milder means to settle difficulties and remove apprehensions. He enumerates several causes which had been deemed sufficient to justify a declaration of war, and most of them as entirely unsatisfactory, and concludes that, “war is a matter of the weightiest importance, and by it the innocent suffer a great many afflictions, and, therefore, peace should be the end at which all our councils ought to aim.” (*Grotius, de Jur. Bel. ac Pac.*, lib. 2, caps. 22, 23; *Burlamaqui, Droit de la Nat. et des Gens*; tome 5, pt. 4, ch. 2; *Phillimore, On Int. Law*, vol. 3, § 48. *Bello, Derecho Internacional*, pt. 2. cap. 1, § 3.)

§ 10. The remarks of Chancellor Kent, upon this question, are equally just and appropriate. He adopts the opinions of Grotius, and “condemns the doctrine, that war may be undertaken to weaken the power of a neighbor, under the apprehension that its further increase may render him dangerous. This would be contrary to justice, unless we were morally certain, not only of a capacity, but of an actual intention to injure us. We ought rather to meet the anticipated danger by a diligent cultivation and prudent management of our own resources. We ought to conciliate the respect and good will of other nations, and secure their assistance, in case of need, by the benevolence and justice of our conduct. War is not to be resorted to without absolute necessity, nor unless peace would be more dangerous and more miserable than war itself.” (*Kent, Com. On Am. Law*, vol. 1, p. 48; *Grotius, de Jur. Bel. ac Pac.*, lib. 5, cap. 22; *Phillimore, On Int. Law*, vol. 2, § 48; *Paley, Moral and Pol. Philosophy*, b. 6, ch. 12.)

§ 11. As has already been remarked, it is not sufficient, in the forum of conscience, that we have just grounds for war, or that its objects are justifiable; we must, also, have good and proper motives for undertaking it. Thus, we may have received injuries, and suffered aggressions from another nation, which would, in themselves, have constituted good and

sufficient reasons for declaring war against it, but, through fear or policy, we have not done so. In the meantime, the state from which we received the injury may have been so humbled or reduced as to be utterly unable, either to repeat the aggression, or to recompense us for the harm it formerly did us. What motive have we now for declaring war against that state? Solely that of *revenge*, which can be considered neither good nor proper. The motives of a war are divided, as already stated, into two classes: 1st, *Commendable*, and 2d, *Vicious*. (*Garden, De Diplomatie*, liv. 6, § 5; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 7; *Vattel, Droit des Gens*, liv. 3, ch. 3, § 29; *Bello, Derecho Internacional*, pt. 2, cap. 1, § 8; *Burlamaqui, Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 2; *De Felice, Droit de la Nat.*, etc., tome 2, lec. 21.)

§ 12. *Commendable motives* are derived from the good of the state and the protection of the people. If the motive for the war is to prevent an injury, or to repair one by obtaining a just satisfaction, or to provide for our future safety by obtaining a reparation for an injury done, or to recover a right of which we have been unjustly deprived, it is both proper and commendable. And when a war is undertaken from such a motive, and for a justifiable cause, we have not only justice on our side, but the sympathies of all good men, for

“Thrice is he armed who has his quarrel just.”

But although a war might be undertaken for commendable motives, the motives of its continuance may be very different. It may be commenced to prevent or repair an injury, but continued for the purposes of revenge or conquest. Thus, the Samnites had given Rome just cause of war by ravaging the lands of her allies. But when the former had offered full reparation for the damages, and every reasonable satisfaction, the latter, bent on conquest, refused to accept the offers of the Samnites, or to be appeased by their submissions. (*Vattel, Droit des Gens*, liv. 3, ch. 3, §§ 30, 36; *Leiber, Political Ethics*, b. 7, ch. 3, § 28; *Bello, Derecho Internacional*, pt. 2, cap. 1, § 3; *De Felice, Droit de la Nat.*, etc., tome 2, lec. 21; *Real, Science du Gouvernement*, tome 5, ch. 2, sec. 2, § 14.)

§ 13. *Vicious motives* are not derived from the good of the state or the protection of its citizens, but from the sugges-

tions of evil passions. Such are the motives which spring from unbridled and wicked ambition,—the arrogant desire for command, the ostentation of power, the thirst for riches, the avidity of conquest, — from jealousy, hatred and revenge. In the words of Vattel: “If a nation, on an injury done to her, is induced to take up arms, not by the necessity of procuring a just reparation, but by a vicious motive, she abuses her right. The viciousness of the motive tarnishes the lustre of her arms, which might otherwise have shown as the cause of justice; the war is not undertaken for the lawful cause, which the nation had to undertake in it; that cause is now no more than a pretext.” (*Vattel, Droit des Gens*, liv. 3, ch. 3, §§ 30, 31; *Burlamaqui, Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 2; *Bello, Derecho Internacional*, pt. 2, cap. 1, § 3; *De Felice, Droit de la Nat., etc.*, tome 2, lec. 21; *Paley, Moral and Pol. Philosophy*, b. 6, ch. 12; *Rayneval, Inst. du Droit, etc.*, liv. 3, ch. 1, § 3.)

§ 14. *Pretexts* are the reasons which are alleged in justification of a war, when the real motives are different. Thus, the true cause of the war which Greece undertook against the Persians, was the experience she had had of their weakness, while the pretext, alleged by Philip, and by Alexander after him, was the desire of avenging the injuries which the Greeks had so often suffered, and of providing for their future safety. “Pretexts,” says Vattel, “are at least an homage which unjust men pay to justice. He who screens himself with them, shows that he still retains some sense of shame. He does not openly trample on what is most sacred in human society; he tacitly acknowledges that a flagrant injustice merits the indignation of all mankind.” (*Vattel, Droit des Gens*, liv. 3, ch. 3, § 32; *Burlamaqui, Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 2; *De Felice, Droit de la Nat., etc.*, tome 2, lec. 21; *Ortolan, Diplomatie de la Mer*, liv. 3, ch. 1; *Rayneval, Inst. du Droit, etc.*, liv. 3, ch. 1, § 4; *Real, Science du Gouvernement*, tome 5, ch. 2, sec. 2, § 17.)

§ 15. All modern ethical writers regard an *unjust* war as as not only immoral, but as one of the greatest of crimes — murder on a large scale. Such are all wars of mere ambition, engaged in for the purpose of extending regal power or national sovereignty; wars of plunder, carried on from mer-

cenary motives; wars of propagandism, undertaken for the unrighteous purpose of compelling men to adopt certain religious or political opinions, whether from the alleged motives of "introducing a more orthodox religion," or of "extending the area of freedom." Such wars are held in just abhorrence by all moral and religious people; and it is becoming the settled conviction of the masses of all nations, that wars should be undertaken only in cases of dire necessity, and after all pacific measures have been exhausted. (*Kent, Com. on Am. Law*, vol. 1, p. 49; *Vattel, Droit des Gens*, liv. 3, ch. 3, § 24; *Manning, Law of Nations*, pp. 94-103; *Leiber, Political Ethics*, b. 7, § 16; *Garden, De Diplomatie*, liv. 6, § 5; *Bello, Derecho Internacional*, pt. 2, cap. 1, § 3; *De Felice, Droit de la Nat, etc.*, tome 2, lec. 21; *Paley, Moral and Pol. Philosophy*, b. 6, ch. 12; *Rayneval, Inst. du Droit, etc.*, liv. 3, ch. 1, § 3.)

§ 16. Some of the early fathers of the church went so far as to adopt the principle, that war, *in any case*, and *under any circumstances*, is unjustifiable, because contrary to the revealed will of God, and that all christians were forbidden to bear arms. The consequence was that the Roman soldiers, who became converts to christianity, deserted their flags in crowds, and some suffered martyrdom rather than continue in the military service. This extreme doctrine afforded the opponents of christianity good ground for saying that it was destructive of civil government, and that a state composed of true christians could not subsist. Moreover, it became evident, that if christians were not permitted to use arms in self-defense, they must all perish by the incursions and invasion of the barbarians. The question was referred to Saint Augustin, the most learned father in the east. His answer was: "If the christian law had forbidden all wars, it would have been said to the soldiers who, in the evangelist, asked the way of salvation, to throw away their arms and abandon the military service. But it had only been said to them: *Do violence to no man, neither accuse any falsely; and be content with your wages.* Let those who think christianity opposed to the state, form an army of such soldiers as our doctrine requires, and then let them dare to say that it is an enemy of the republic, or rather let them confess that, always obedient, it is the salva-

tion of the republic." The church gave its sanction to this doctrine, and the councils pronounced excommunication against those who deserted, even in time of peace. The various objections to war, made by the earlier fathers of the church, have been often repeated by modern writers on moral science, and more recently, Dymond, Wayland, and others, have pressed them upon the public with great zeal and eloquence. We propose a brief summary of these objections to war, and of the answers which have been made to them. The arguments of Dr. Wayland, which are mostly copied from Dymond's *Essays*, are given in brief space, and in more moderate and temperate language than that used by most of his followers. We shall copy his own words so far as our limits will permit. (*Dymond, Essays on Morality*, essay 3, ch. 19; *Wayland, Elem. Moral Science*, b. 2, p. 2, d. 2, ch. 4; *Leiber, Political Ethics*, b. 7, § 17; *Neander, Gesch. der Christ. Religion*, b. 1, p. 249; *Neander, Hist. of Ch. Religion and Church*, Torrey, trans., vol. 1, p. 272; *Origenes, Opera*, c. *Celsum*, 5, 33; *Laurent, Droit des Gens*, tome 4, liv. 4, ch. 1; *Tertulian, Opera*, *De Id.* 19; *de la Corona*, c. 11; *St. Augustinus, Opera, Epist.*, pp. 136–238; *Athanasius, Opera*, lib. 2, p. 960; *St. Basilus, Opera, Epist. ad. Amphil.*, can. 8; *Council of Arles*, can. 3; *Gibbon, Decline and Fall of the R. Empire*, ch. 43; *St. Polinus, Opera, Epist.* 25.)

§ 17. Dr. Wayland's first objection is, that "all wars are contrary to the revealed will of God." But in this assertion, he assumes what is to be proved. There is no direct prohibition of war in the bible. In the old testament, we find war, in some cases, positively commanded; and in the new testament, there is not a word against the lawfulness of war. On the contrary, the soldier was told to be content with his wages. Again, he says: "God commands us to love every man, alien or citizen, Samaritan or Jew, as ourselves," and, from this, infers that inasmuch as we are to love all men as ourselves, we are forbidden, as a nation, to engage in war. To this it is answered, that we are nowhere commanded to love all men in the same degree, for Christ had his *beloved* disciple, one whom he loved preëminently and above all the others, though he loved the others none the less on that account. Again, this command, taken literally and as con-

struted by Dr. Wayland, would render sinful the best affections of our nature,—those which we bear for our parents, our wives and children, for our kindred, and our countrymen. Moreover, the use of force to resist an attack or punish an offense, is by no means opposed to the command of love to all mankind. We resist the murderer and the robber, and we punish them for crimes and offenses committed, but these acts do not imply *hate or revenge*. So it is in war, the soldier has no personal malice against his opponent. (*Dymond, Essays on Morality*, e. 3, ch. 19; *Wayland, Moral Science*, b. 2, p. 2, d. 2, ch. 4; *Leiber, Political Ethics*, b. 7, § 17; *Paley, Moral and Pol. Philosophy*, b. 6, ch. 12; *Halleck, Elem. Military Art and Science*, pp. 9–12.)

§ 18. Dr. Wayland next considers the question, whether we may engage in war for self-defense, and concludes that, to forcibly repel the attack of another nation, would be establishing the principle that it is “for the advantage of him who lives among a community of thieves, to steal, or for him who lives among liars, to lie.” My living among thieves would not justify me in stealing, nor would it be any reason why I should neglect the security of my property, or leave the thief unpunished. Our living among nations who carry on unjust wars, would not justify us in doing so, nor should it prevent us from repelling or punishing those who wage an unjust war against us. The argument used against war, equally applies against the prevention and punishment of individual offenses and crimes. (*Wayland, Moral Science*, b. 2, p. 2, d. 2, ch. 4; *Leiber, Political Ethics*, b. 7, § 17; *Paley, Moral and Pol. Philosophy*, b. 3, pt. 2, ch. 10; b. 4, ch. 1; b. 6, ch. 12; *Halleck, Elem. Military Art and Science*, pp. 13–14.)

§ 19. Dr. Wayland admits that, however just and benevolent a nation may be, its moral character will not always protect it from the aggression of others, but he adds: “if this method, (that is, moral suasion,) fail, why then let us suffer the evil.” This maxim, if applied to its full extent, would be subversive of all right, and soon place all power in the hands of the worst men in community, and of the worst nations that inhabit the world. Reason with the robber and murderer, and if they will not desist, why then let them take our property and the lives of our families! Reason with the

foreign nations who invade our soil, and if they will not resist, why then let them destroy our government and reduce us to slavery! But says the Dr.: "I believe aggression, from a foreign nation, to be an intimation from God that we are disobeying the law of benevolence, and that is his mode of teaching nations their duty, in this respect, to each other. So that aggression seems to me in no manner to call for retaliation and injury, but rather, for special kindness and good will." This is certainly carrying the principle of non-resistance very far; we are not only to suffer the evil, but to thank the evil-doer, for thus reminding us of our forgetfulness of the law of benevolence! (*Dymond, Essays on Morality*, e. 3, ch. 19; *Wayland, Moral Science*, b. 2, p. 2, d. 2, ch. 4; *Paley, Moral and Pol. Philosophy*, b. 4, ch. 1; b. 6, ch. 12; *Leiber, Political Ethics*, b. 7, §§ 17-19; *Halleck, Elem. Military Art and Science*, pp. 15-21.)

§ 20. Again, it is argued that war necessarily begets immorality, and "that the cultivation of a military spirit is injurious to community, inasmuch as it aggravates the source of the evil, the corrupt passions of the human heart." The correctness of this statement is denied, for war is not necessarily demoralizing. Unjust war results from immoral causes, and is generally injurious in its moral effects upon society. The same may be said of unjust litigation. But suppose that all wars and all courts of justice were abolished, and nations, as well as individuals, were suffered to commit injuries with impunity, would not immorality and vice increase, rather than diminish? Few events rouse and elevate the patriotism and character of a nation more than a just and patriotic war. Such was the Dutch war of independence against the Spaniards, the German war against the aggressions of Louis XIV., the French war against the coalition of 1792, and the war of the American revolution. (*Wayland, Moral Science*, b. 2, p. 2, d. 2, ch. 4; *Dymond, Essays on Morality*, e. 3, ch. 19; *Leiber, Political Ethics*, b. 7, § 20; *Paley, Moral and Pol. Philosophy*, b. 3, pt. 2, ch. 10; b. 6, ch. 12; *Halleck, Elem. Military Art and Science*, ch. 1, pp. 22, 23.)

§ 21. With respect to "pecuniary expenditure," it is not to be denied that wars, and the means of military defense, have cost vast sums of money; so, also, have litigation, and the



means deemed requisite in all civilized countries, in all ages, for maintaining justice between individuals. If these vast sums of money are necessary to secure justice between individuals of the same nation, can we expect that the means of international justice can be maintained without expenditures commensurate with the object in view? If we cannot rely exclusively upon the "law of active benevolence," for maintaining justice between brothers of the same country, can we hope that, in the present state of the world, strangers and foreigners will be more ready to comply with its requisitions? (*Wayland, Elem. Moral Science*, b. 2, p. 2, d. 2, ch. 4; *Halleck, Elem. Mil. Art and Science*, ch. 1, p. 28; *Leiber, Political Ethics*, b. 7, §§ 19, 20.)

§ 22. Again, it is objected to war, that men, being rational beings, should contend with one another by argument, and not by force, as do the brutes. To this, it is answered, that force properly begins only where argument ends. If he who has wronged me cannot be persuaded to make reparation, I apply to the court, that is, to legal force to compel him to do me justice. So ought we resort to *military* force only when all other means fail to prevent aggression and injury. War should always be the last resort of nations, the *ultima ratio regii*. (*Hooker, Eccles. Pol.*, b. 1, § 10; *Phillimore, On Int. Law*, vol. 3, § 49; *Halleck, Elem. Mil. Art and Science*, ch. 1, p. 28; *Leiber, Political Ethics*, b. 7, §§ 18, 28; *De Felice, Droit de la Nat., etc.*, tome 2, lec. 21.)

§ 23. But it is objected to war, that it does not accomplish the object for which it is used, because it often fails to procure a redress of grievances, or to prevent repeated and continued aggression. So does a resort to civil force, but such a resort is none the less proper and just on that account. The uncertainty of litigation is proverbial. The injured party often fails to procure a redress of his grievances, and the aggressor is not unfrequently triumphant. Moreover, even if successful in his suits, the injured party often loses more than he gains pecuniarily by litigation, and, after all, he fails to prevent a repetition of the aggression. But would any sane man say that, for this reason, all litigation and courts of justice should be abolished? In civil, as well as in military life, the innocent party is sometimes the sufferer.

(*Phillimore, On Int. Law*, vol. 8, § 50; *Leiber, Political Ethics*, b. 7, § 19; *Halleck, Elem. Military Art and Science*, ch. 1, p. 28; *Burke, Letters on a Regicide Peace*, vol. 8, p. 181.)

§ 24. But, it is said, in all wars one party must be in the wrong, and frequently the war is unjust on both sides. Precisely so in suits at law; one party is necessarily wrong, and frequently both resort to the civil tribunals in hopes of attaining unrighteous ends. But for this reason must all courts of law be abolished, and no one be allowed to resort to the civil tribunals to procure a redress of grievances? Must individuals in civil life rely solely upon the "law of active benevolence," for the security of their persons and property, and shall all wrong-doers and criminals go "unwhipt of justice?" This is the legitimate consequence of the argument. (*Vattel, Droit des Gens*, liv. 3, ch. 3, § 89; *Leiber, Political Ethics*, b. 7, § 19; *Halleck, Elem. Mil. Art and Science*, ch. 1, p. 29; *Phillimore, On Int. Law*, vol. 8, § 50; *De Felice, Droit de la Nat., etc.*, tome 2, lec. 21.)

§ 25. But, it is said, nations do not resort to civil tribunals, like individuals, to settle their differences, but resort to brute force, to war. For the reason that it is believed a tribunal of this character—a *congress of nations*—for the settlement of international differences, would be productive of more evil than good. By such an arrangement, the old and powerful nations of Europe would acquire the authority to interfere in the domestic affairs, and control the influence and power of the weaker states. Republics, and governments founded on popular sovereignty, could never act in unison with those kings and despots. Moreover, such a tribunal would not prevent war, for military force would still be resorted to to enforce its decisions. For these, and other reasons, it is deemed better and safer to rely on the present system of international law. Under this system, and with a constitutional government of limited and divided powers, a resort to the arbitrament of war is not the result of impulse and passion, a yielding to the mere "bestial propensities" of our nature; it is usually, in such governments, the deliberate and solemn act of the legislative power, of the representatives of the national mind, convened as the high council of the people. (*Phillimore, On Int. Law*, vol. 8, § 50; *Leiber, Political Ethics*,

b. 7, § 22; *Legare, Rep. House of Reps.*, June 1864, 1866; *Halleck, Elem. Mil. Art and Science*, ch. 1, p. 20.)

§ 26. Again, it is said that the benefits of war are more than counterbalanced by the evils it entails, and that, "most commonly, the very means by which we repel a despotism from abroad, only establishes over us a military despotism at home." Much has been said and written about *military* despotism, but we think he who studies history thoroughly, will not fail to prefer a military despotism to a despotism of mere politicians. The governments of Alexander and Charlemagne, were infinitely preferable to those of the petty civil tyrants who preceded and followed them; and there is none so blinded by prejudice as to say that the reign of Napoleon was no better than that of Robespierre, Danton, and the other "lawyers" who preceded him, or of the Bourbons, for whom he was dethroned. We could point to numerous instances where the benefits of war have more than compensated for the evils which attended it; benefits not only to the generations who engaged in it, but also to their descendants for long ages. Had Rome adopted the non-resistance principle when Hannibal was at her gates, we should now be in the night of African ignorance and barbarism, instead of enjoying the benefits of Roman learning and Roman civilization. Had France adopted this principle when the allied armies invaded her territories, in 1792, her fate had followed that of Poland. If the United States had adopted this principle in 1776, what would now be the character and condition of America? (*Leiber, Political Ethics*, b. 7, § 21; *Halleck, Elem. Mil. Art and Science*, ch. 1, pp. 30-33; *Dymond, Essay on the Principles of Morality*, essay 3, ch. 19.)

§ 27. We have thus noticed, in detail, the various arguments against war used by the advocates of non-resistance, not because the arguments themselves have any real foundation or force, but on account of the character and influence of their authors, and the effect they apparently produce, not only upon religious enthusiasts, but also upon many christian philanthropists. Such arguments need only to be examined to convince us of their weakness and absurdity, however plausible they may appear at first sight.

We cannot better terminate this chapter, than by quoting the following peculiarly just and appropriate remarks of Dr.

Leiber, on the influence and character of war: "The continued efforts," he says, "requisite for nations to protect themselves against the ever repeated attacks of a predatory foe, may be infinitely greater than the evils entailed by a single and energetic war, which forever secures peace from that side. \* \* No human mind is vast enough to comprehend in one glance, nor is any human life long enough to follow out consecutively all the immeasurable blessings, and the unspeakable good, which have resulted to mankind from the ever-memorable victories of little Greece over the rolling masses of servile Asia, which were high sweeping over Europe like the high tides of a swollen sea, carrying its choking sand over all the germs of civilization, liberty, and taste, and nearly all that is good and noble. \* \* Wars have frequently been, in the hands of providence, the means of disseminating civilization, if carried on by a civilized people — as in the case of Alexander, whose wars had a most decided effect upon the intercourse of men and extension of civilization — or of rousing and re-uniting people who had fallen into lethargy, if attacked by less civilized and numerous hordes. Frequently we find, in history, that the ruder and victorious tribe is made to recover, as it were, civilization, already on the wane, with a refined nation. Paradoxical as it may seem at first glance, it is, nevertheless, amply proved by history, that the closest contact, and consequent exchange of thought and produce, and enlargement of knowledge, between two otherwise severed nations, is frequently produced by war. War is a struggle, a state of suffering; but as such, at times, only that struggling process without which, — in proportion to the good to be obtained, or, as would be a better expression for many cases, to the good that is to be borne — no great and essential good falls ever to the share of man. Suffering, merely as suffering, is not an evil. Our religion, philosophy, every day's experience, prove it. No maternal rejoicing brightens up a mother's eye, without the anxiety of labor." (*Leiber, Political Ethics*, b. 7, §§ 20, 21; *Halleck, Elem. Mil. Art and Science*, ch. 1, pp. 32, 33; *For opinions of Grotius on the subjects of this chapter, vide his work, De Jur. Bel. ac Pac.*, lib. 1; lib. 2, caps. 1, 20, and lib. 3, cap. 5.)

# CHAPTER XIV. DIFFERENT KINDS OF WARS

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§ 1. War has been defined, "A contest between states, or parts of states, carried on by force." This definition is by some considered defective, and as excluding that class of civil wars which are sometimes carried on between families and nations which do not constitute either states or organized parts of states; like the wars of the Guelphs and Ghibellines in Italy, the guerilla wars in Spain, and the wars of factions in Mexico and South America. But a close exami-

nation into the origin and nature of these wars will show that they are, in most cases, waged by organized parts of a state, and have reference to some principle of internal organization or party supremacy. (*Massé, Droit Commercial*, tome 1, § 118; *Ortolan, Regles Internationales*, liv. 3, ch. 1; *Grotius, de Jur. Bel. ac Pac.*, lib. 1, cap. 1, § 2; *Puffendorf, de Jur. Nat. et Gent.*, lib. 1, cap. 1, § 8; *Albericus Gentilis, de Jur. Bel.*, lib. 1, cap. 2; *Bynkershoek, Quaest. Jur. Pub.*, lib. 1, cap. 1; *Leiber, Political Ethics*, b. 7, § 15; *Jomini, Precis de l'Art de la Guerre*, ch. 1; *Martens, Precis du Droit des Gens*, § 263; *Phillimore, On Int. Law*, vol. 3, § 49; *Wildman, Int. Law*, vol. 2, p. 2; *Manning, Law of Nations*, pp. 94–96; *De Felice, Droit de la Nat., etc.*, tome 2, lecs. 20, 22; *Bello, Derecho Internacional*, pt. 2, cap. 1, § 1; *Heffter, Droit International*, § 118; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 7; *Rayneval, Inst. du Droit Nat.*, liv. 3, ch. 1, § 1.)

§ 2. Wars have been divided into different classes, according to the views and professions of those who discuss them. Military writers, generally, consider them in relation to the military operations which are carried on, and, therefore, divide them into *offensive* and *defensive* wars. But these terms are here used in a very different sense from that in which they are usually employed by political and ethical writers; for a war may be essentially defensive in its political and moral character, even where we begin it, if intended to prevent an attack or invasion, which is under preparation. A nation which first incites the war, is the real offender, by its aggression on the rights of others, although, as a matter of policy, it may confine itself to operations which are, in a military point of view, merely defensive. Hence wars, which are entirely offensive in their military character, are sometimes essentially defensive in their nature and origin, and *vice versa*. (*Jomini, Precis de l'Art de la Guerre*, ch. 1; *Halleck, Elem. Military Art and Science*, ch. 2, p. 35; *Garden, De Diplomatie*, liv. 6, § 5; *Phillimore, On Int. Law*, vol. 3, § 67; *Kent, Com. On Am. Law*, vol. 1, p. 50, note; *Rayneval, Inst. du Droit Nat.*, liv. 3, ch. 2; *Ortolan, Diplomatie, de la Mer*, tome 2, p. 5; *De Felice, Droit de la Nat., etc.*, tome 2, lec. 20; *Bello, Derecho Internacional*, pt. 2, cap. 1, § 3; *Wheaton, Elem. Int. Law*, pt. 3, ch. 2, § 15; *Burlamaqui, Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 8.)

§3. But historians and publicists have generally divided wars according to their origin, objects, and effects, having reference, also, to the character of the parties which engage in them. Thus, historians have classified these contests, as *wars of intervention, wars of insurrection or of revolution, wars of independence, wars of conquest, wars of opinion, religious wars, national wars, and civil wars*. They have also classified them according to the general theater of military operations, as *land wars, and maritime wars*; or, as *Asiatic, African, European, and American wars*. Again, they are sometimes divided, with respect to periods of time or of history, as *ancient and modern wars, or wars of antiquity, of classic history, of the middle ages, and of recent times*. The exact periods of these several divisions are not definitively fixed, nor are the divisions themselves of much importance in international jurisprudence, except that it is to be remembered that the rules of international law, adopted at one period, may not be applicable to another period. (*De Felice, Droit de la Nat.*, tome 2, lec. 22; *Jomini, Precis de l'Art de la Guerre*, ch. 1; *Halleck, Elem. Mil. Art and Science*, ch. 2, pp. 35, 36; *Ortolan, Diplomatie de la Mer.*, liv. 3, ch. 2.)

§4. Publicists, on the other hand, have divided and classified these contests with reference to the affairs of state, the legal status of the parties engaged in them, and the international rights and obligations which result from them. Thus, text-writers usually classify them as *public or solemn wars, perfect wars, and imperfect wars, mixed wars, the non-solemn kind of wars*, and acts of hostility not followed by actual war, but governed by the laws of war. Such classification is of little importance, except so far as it may be necessary to distinguish between the rules applicable to particular cases. These distinctions, however, are sometimes adhered to with great tenacity, and argued with great learning in diplomatic discussions of questions growing out of the hostile acts of particular states. We will now proceed to discuss these different kind of wars, and the rights and duties peculiarly applicable to each. (*Vattel, Droit des Gens*, lib. 3, ch. 1, § 2; *Wheaton, Elem. Int. Law*, pt. 4, ch. 1, §§ 6, 7; *Grotius, de Jur. Bel. ac Pac.*, lib. 1 cap. 3, § 4; *Kent, Com. on Am. Law*, vol. 1, pp. 50, 51; *Ortolan, Diplomatie de la Mer.*, liv. 3, ch. 1;

*Rayneval, Inst. du Droit Nat.*, liv. 8, ch. 2; *De Felice, Droit de la Nat.*, etc., tome 2, loc. 22; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 7; *Wildman, Int. Law*, vol. 2, p. 8.)

§ 5. *Wars of insurrection, and of revolution*, are generally those undertaken to gain, or to regain the liberty or independence of the party or state which undertakes them; as was the case with the Americans in 1776, against England; of the Mexicans, and South American states, against Spain; of the Greeks, in 1821; and of the Hungarians in 1848, and the Italians in 1860. A war of revolution is generally undertaken for the dismemberment of a state, by the separation of one of its parts, or for the overthrow and radical change of the government; while an insurrectionary war is sometimes waged for a very different purpose. Both, however, have respect to the internal affairs of the state, rather than to its external relations. They are, therefore, in one sense, civil wars, and are governed by the same general rules which are applied to that class of wars. (*Jomini, Precis de l'Art de la Guerre*, ch. 1; *Halleck, Elem. Mil. Art and Science*, ch. 2, pp. 85, 86; *Wheaton, Elem. Int. Law*, pt. 2, ch. 1, § 3; *Leiber, Political Ethics*, b. 7, § 23; *Bello, Derecho Internacional*, pt. 2, cap. 10, § 1; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 14; *Taylor On Revolutions, etc.*, passim.)

§ 6. *Wars of independence* are those waged by a state against foreign dictation and control; such as the wars of Poland against Russia, of the Netherlands against Spain, of France against the several coalitions of the allied powers, of the Spanish Peninsula against France, of India against England, of Hungary against Austria, and of Turkey against Russia. The war of 1812, between the United States and England, partook largely of this character, and some judicious historians have denominated it the war of American independence, as distinguished from the war of the American revolution, by which the revolted colonies attained the position of a distinct and separate sovereignty. (*Jomini, Precis de l'Art de la Guerre*, ch. 1; *Ingersol, History of the Second War, etc., Int.*; *Halleck, Elem. Mil. Art and Science*, ch. 2, p. 36; *Leiber, Political Ethics*, b. 7, § 23; *Armstrong, Notices of the War of 1812*, vol. 1, ch. 1.)



§ 7. *Wars of opinion* have been subdivided into two classes, *political wars*, and *religious wars*. As examples of the former, we may mention those which the Vandeanes have sustained in support of the Bourbons, and those France sustained against the Allies, as also those of propagandism waged against the smaller European states by the republican hordes of the French revolution. As examples of the latter, we may mention the Jewish wars, the wars of Islamism, those of the crusades, and of the reformation. Religious wars are the most cruel and bloody, and are often carried on without any regard to the rules of international law. All wars of opinion are more cruel than those resulting from principle, policy or necessity. (*Jomini, Precis de l'Art de la Guerre*, ch. 1, art. 7; *Halleck, Elem. Mil. Art and Science*, ch. 2, p. 36; *De Felice, Droit de la Nat., etc.*, tome 2, lec. 22; *Laurent, Droit des Gens*, tome 4, liv. 4, ch. 1; *Stephen, On History of France*, lecs. 15, 16.)

§ 8. *Wars of conquest* are those undertaken for the acquisition of territory and the extension of empire, like those of the Romans in Gaul and Britain, of the English in India, Africa and America, of the French in Egypt and Africa, of the Spaniards in America, and of the Russians in Circassia and Turkey. The recent war of the United States against Mexico, partook largely of the character of a war of conquest, at least in its prosecution. Hostilities were commenced by the Mexicans, and the Americans had suffered innumerable wrongs before the commencement of the war. And although the avowed object of the United States, in engaging in the war, was simply to obtain "indemnity for the past and security for the future," yet, as Mexico could offer no other indemnity, it was determined, from the beginning, to seize upon and retain a portion of her territory. In its essential features it was, therefore, a war of conquest. Such wars may, or may not, be justifiable, according to the circumstances under which they are undertaken. (*Jomini, Precis de l'Art de la Guerre*, ch. 1, art. 6; *Halleck, Elem. Mil. Art and Science*, ch. 2, p. 36; *Ripley, Hist. War with Mexico*, vol. 1.)

§ 9. *Civil wars* are those which result from hostile operations, carried on between different parts of the same state, as the wars of the roses in England, of the league in France, of

the Guelphs and Ghibelines in Italy, and of the factions in Mexico and South America. Wars of insurrection and revolution are, in one sense, *civil wars*; but this term is more usually applied to those contests which are waged between rival families or factions, for party ascendancy in a state, rather than for its dismemberment, or for a radical change in its government. Each party, in such cases, is usually entitled to the rights of war as against the other, and, also, with respect to neutrals. Mere rebellions, however, are considered as exceptions to this rule, as every government treats those who rebel against its authority according to its own municipal laws, and without regard to the general rules of war which international jurisprudence establishes between sovereign states. As is shown elsewhere, every neutral state, in such a contest, must determine for itself when it will consider a party in a rebellion, insurrection, revolution, or civil war, entitled to the rights of a belligerent in its international relations. Yet, it does this under its international responsibility to the state, previously recognized as sovereign, against which the rebel, insurgent, or revolutionary forces wage hostilities. To recognize every such force as a legitimate belligerent, and invest it with the rights and powers which international law confers upon a sovereign state, would be both unjust and insulting to the government of the state against which the rebellion or revolution is attempted; while, on the other hand, it might be equally unjust toward the other party, to refuse to concede to it any belligerent rights. Each case must be determined by its own peculiar circumstances, all foreign powers, which wish to preserve their neutrality, strictly observing the principle of non-interference. (*Jomini, Precis de l'Art de la Guerre*, ch. 1, art. 9; *Halleck, Elem. Mil. Art and Science*, ch. 2, p. 36; *Wheaton, Elem. Int. Law*, pt. 4, ch. 1, § 7; *Leiber, Political Ethics*, b. 7, § 23; *Polson, Law of Nations*, sec. 6; *Manning, Law of Nations*, p. 98; *Bello, Derecho Internacional*, pt. 2, cap. 10, § 1; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 14.)

§ 10. *National wars* are those where the great body of the people of a state take up arms and join in the contest, like those of the Swiss against Austria and the Duke of Burgundy, of the Catalans in 1712, of the Dutch against Philip II., of

the Americans against England, of the Poles and Circassians against Russia, and of the Hungarians against Austria. A war may be a war of insurrection, or revolution, or independence, and, at the same time, a national war. Where such insurgent militia are called into the field, and organized under the constituted authorities of the state, they are entitled to all the rights of war, and are subject to all its duties and responsibilities. (*Jomini, Precis de l'Art de la Guerre*, ch. 1, art. 8; *Halleck, Elem. Mil. Art and Science*, ch. 2, p. 86; *Pelton, Law of Nations*, sec. 6; *Manning, Law of Nations*, p. 158.)

§ 11. *Wars of intervention* are those where one state interferes in favor of a particular state as against others, or in favor of a particular party, sovereign, or family in a state. This intervention is divided into two classes, according as it is made with respect to the *internal* or *external* affairs of a nation. The interference of Russia in the affairs of Poland, of England in the government of India, of Austria and the allied powers in the affairs of France during the revolution, and under the empire, are examples under the first head. The intervention of the Elector Maurice of Saxony against Charles V., of King William against Louis XIV. in 1688, of Russia and France in the seven years war, of Russia again between France and Austria in 1805, and between France and Prussia in 1806, of France, Great Britain, and Sardinia, between Turkey and Russia in 1854, are examples under the second head. (*Jomini, Precis de l'Art de la Guerre*, ch. 1, art. 5; *Halleck, Elem. Mil. Art and Science*, ch. 2, p. 85; *Phillimore, On Int. Law*, vol. 1, §§ 386, et seq.; *Manning, Law of Nations*, p. 97; *Wheaton, Elem. Int. Law*, pt. 2, ch. 1, § 8; *Wheaton, Hist. Law of Nations*, pp. 80-88.)

§ 12. We have pointed out, in another chapter, the distinction between pacific mediation and armed intervention. The former consists in advice, monition, persuasion, and those influences which result from character, power and wealth on one side, and friendship, respect, and, perhaps, a certain degree of dependence, on the other. Such influences may very properly be exerted in the preservation of peace, by bringing about an amicable arrangement of disputes between different states, or between opposing parties in the same state; provided, they are not intended to weaken or destroy

the state itself. *Armed intervention*, on the contrary, consists in threatened or actual *force*, employed, or to be employed, by one state in regulating or determining the conduct or affairs of another. Such an employment of force is virtually a *war*, and must be justified or condemned upon the same general principles as other wars. There are, however, certain rights and duties incident to this particular class of wars which require a separate discussion, distinguishing between the different kinds of intervention, or rather the grounds upon which they have been severally defended or condemned. Having discussed, elsewhere, the subject of pacific interference, as connected with the independence of states, we shall here consider only armed intervention, or the forcible interference of one state in the affairs of another. (*Vide Ante*, chapter iv.; *Phillimore, On Int. Law*, vol. 1, § 399; *Annual Register*, vol. 90, p. 171; vol. 91, ch. 6; *Wheaton, Elem. Int. Law*, pt. 2, ch. 1, § 8; *Manning, Law of Nations*, p. 97.)

§ 18. One of the most common grounds of intervention, by force, is for the *preservation of the balance of power*; that is, to prevent the dangerous aggrandizement of any one state by external acquisitions so as to put in jeopardy the safety of others, or the general peace of nations. This right rests solely on self-defense, for no state would be justified in preventing the lawful acquisition of territory by another, unless such acquisition should directly or mediately affect its own safety. Thus, Hiero, king of Syracuse, sent aid to Carthage, deeming it necessary, as Polybius tells us, "both in order to retain his dominions in Sicily, and to preserve the Roman friendship, that Carthage should be safe, lest by its fall, the remaining power should be able, without let or hindrance, to execute every purpose and undertaking. And here he acted with great wisdom and prudence, for that is never, on any account, to be overlooked, nor ought such a force ever to be thrown into one hand, as to incapacitate the neighboring states from defending their rights against it." (*Phillimore, On Int. Law*, vol. 1, § 396; *Hume, Essays*, vol. 2, p. 328; *Ortolan, Domaine International*, tit. 3; *Wheaton, Elem. Int. Law*, pt. 2, ch. 1, § 3; *Manning, Law of Nations*, p. 97; *Rayneval, Inst. du Droit Nat.*, liv. 1, ch. 1, § 5.)

§ 14. It was on this principle that the Italians urged the European powers to intervene against the aggrandizement of Charles VIII, of France, when he undertook the invasion and conquest of Italy. Again, it was in support of this maxim of international law, against the aggrandizements of the Emperor Charles V., that Francis I, of France, actually concluded a treaty of alliance with the Turks, (the first treaty ever contracted between an European sovereign and the Porte;) and that Roman Catholic France supported, with one hand, the Protestants of Germany in their long and successful opposition to the aggressions of the imperial power, while with the other, and that a hand of iron, she sought to crush the Protestant subjects of her own land. (*Phillimore on Int. Law*, vol. 1, §§ 386, et seq.; *Koch, Tableau des Revolutions*, tome 1, pp. 314, et seq.; *Wheaton, Elem. Int. Law*, pt. 2, ch. 1, §§ 8-15.; *D'Aubigne, Hist. of the Reformation*, b. 12.)

§ 15. A recent example of a war of external intervention is that of England and France in 1854, against Russia, in defense of European Turkey, and to prevent the aggrandizement of the empire of the Czar, by the absorption of a large portion of the Ottoman territory. Russia based her attack upon Turkey, on the ground of protecting the rights of the Greek church, but this was evidently a mere pretext and excuse. It was, on her part, virtually a war of conquest, and of national aggrandizement, and the western powers intervened to check her vast and rapidly increasing military preponderance. Their efforts have been partially successful; and if they have not prevented, they have at least postponed an event of which they had been forewarned by the sagacious and far-seeing policy of the great Napoleon. The Italian war of 1859 was, on the part of France, partly a war of intervention, and partly a war for the defense of an ally. (*Phillimore, On Int. Law*, vol. 1, §§ 399, et seq.; *Pistoye et Duverdy, Traité des Prises Maritimes*, tome 2, app.; *Ortolan, Diplomatie de la Mer*, tome 2, app., spe.; *Heffier, Droit, International*, appendice; *De Cussy, Précis Historique*, ch. 12.)

§ 16. The principle of the *preservation of the balance of power* has been resorted to as a justification for forcible intervention in the internal affairs of states, by connecting it with treaties of guaranty, and the pretended danger that internal changes

in a single state might disturb a general peace. But this is seldom, if ever, a good and sufficient excuse for a resort to armed intervention in the internal affairs of another state, while it has afforded a pretext for numerous cases of international injustice and crime. Instead of preserving peace, its general tendency has been to produce wars, and to destroy what was intended to be preserved. Thus, the interference of Russia, Austria and Prussia, in the internal affairs of Poland, and the consequent spoliation of that kingdom, may be regarded as the legitimate cause of the aggressions of revolutionary France, and the wars of the consulate and empire, by which the equilibrium of Europe was entirely destroyed. (*Wheaton, Elem. Int. Law*, pt. 2, ch. 1, §§ 3-11; *Phillimore, on Int. Law*, vol. 1, §§ 392, 396; *Ortolan, Domaine Int.*, tit. 8; *Heffler, Droit International*, §§ 44-46.)

§ 17. The treaty of Paris, and the congress of Vienna, (1814-15,) sought to restore this equilibrium by the creation of large kingdoms and the absorption of small independent states. "To effect this purpose," says Phillimore, "states were, in several instances, treated simply as containing so many square miles, and so many inhabitants, little or no regard being paid to national feelings, habits, wishes, or prejudices. The annexation of Norway to Sweden, of Genoa to Sardinia, of Venice to Austria, and the diminution of the territory of Saxony, were among the instances of grievous violations of international justice afforded by this treaty, and for which the preservation of the balance of power was the pretext and excuse; but the true and legitimate application of that principle would have been a league of protection of the greater with the smaller states. The policy which seeks to establish one principle of international law upon the ruin of others, has been, and always must be, a policy as fatal to the lasting peace of the world as the attempt to promote one moral duty, at the expense and by the sacrifice of others, is and must be fatal to the peace of an individual; *populus jura naturae gentium que violans, suae quoque tranquillitatis in posterum rescindit munimenta*. (*Phillimore, On Int. Law*, vol. 1, § 398; *Bynkershoek, Quaest. Jur. Pub.*, lib. 1, ch. 25, § 10; *Grotius, Pralegomena*, § 18; *Ortolan, Domaine International*, tit. 3.)

§ 18. Although Great Britain was a party to this coalition, and sanctioned the principle which tainted the treaty of Vienna, yet she expressed her emphatic dissent from the application of it to the *internal* changes of existing states, at the congresses of Trappau in 1820, of Layback in 1821, and of Vienna in 1822, and, also, in Italian affairs in 1860. England, however, has generally supported the principle of intervention in the *external* affairs of states for the preservation of the balance of power, both in Europe and America, at least through the medium of treaty stipulations. On this ground, her military intervention in the affairs of Portugal, in 1826, was defended. And, in 1852-3, she attempted a tripartite treaty with France and the United States, to prevent the absorption, by the latter, of the Island of Cuba, an appendage of Spain, as a means of preserving the "present distribution of power" in America. The United States refused to accede to the arrangement. (*Phillimore, On Int. Law*, vol. 1, § 399; *Wheaton, Elem. Int. Law*, pt. 2, ch. 1, §§ 3, 8; *Cong. Doc.*, 32 Cong., 2 Sess. *Senate, Ex. Doc.*, No. 13; *Alison, Hist. of Europe*, second series, ch. 8, §§ 70-76.)

§ 19. Another ground, upon which wars of intervention have been attempted to be justified, is the obligations of treaty stipulations. These may have relation both to internal and to external affairs. The quadruple alliance of 1834, by which England and France intervened in the affairs of Spain and Portugal, to expel Don Carlos and Don Miguel from the territories of the two kingdoms, and the intervention of the western powers of Europe, in 1854, between Turkey and Russia, are examples of both these kinds of wars. The latter, however, was more properly an intervention to preserve the balance of power, and even the former was not altogether founded on treaty obligations. Wars of intervention are to be justified or condemned accordingly as they are, or are not, undertaken strictly as the means of self-defense, and self protection against the aggrandizements of others, and without reference to treaty obligations, for, if wrong in themselves, the stipulations of a treaty cannot make them right. (*Phillimore, On Int. Law*, vol. 1, §§ 399, et seq.; *Wheaton, Hist. Law of Nations*, pp. 523, et seq.; *De Cussy, Precis Historique*, ch. 12; *Alison, Hist. Europe*, second series, ch. 12, § 180; *Heffter, Droit International*, appendice.)

§ 20. Still another ground, upon which wars of intervention have been justified, is the invitation of the contending parties. We have shown, in a preceding chapter, that pacific mediation may, where the mediating power acts the part of *an arbitrator*, sometimes properly lead to forcible intervention. Such intervention is not confined to conquests between sovereign states, but may be applied to cases of civil war, if the state be really divided against itself, and there be two *bona fide* parties waging actual war against each other. It has well been said that “no mere temporary outbreak, no isolated resistance to authority, no successful skirmish, is sufficient for this purpose; there should be such a contest as exhibits some equality of force, and of which the issue would be, in some degree, doubtful. In most cases, therefore, some time must elapse before an internal commotion can be clothed with the character of a revolution.” In case of a mere insurrection, which has not acquired the character of a revolution, the insurgents are not considered capable of negotiating with a foreign state, or of becoming a party to any agreement with respect to arbitration or foreign intervention. We have already stated that the invitation of one party to a civil war can afford no right of foreign interference, as against the other party. The same reasoning holds good with respect to armed intervention, whether between belligerent states, or between belligerent parties in the same state. Nevertheless, the invitation of one party is often put forward, in connection with other reasons, to justify armed intervention. Thus, the aid rendered by England, under Queen Elisabeth, to the revolted Netherlands, against Spain, was based, not only on the ground of invitation by the Dutch, but, also, on that of protecting her Protestant subjects, and of checking the overshadowing power of Philip II. The interference of Great Britain, France, and Russia, in the affairs of Greece was vindicated upon three grounds, viz.: “First, of complying with the request of one party; secondly, of staying the effusion of blood; thirdly, and principally, of affording protection to the subjects of other powers who navigated the Levant. (*Phillimore, On Int. Law*, vol. 1, § 395; *State Papers, Greece*, 1826–1832, pp. 54, 55; *De Cussy, Precis Historique*, ch. 9; *Mackintosh, Miscellaneous Works*, pp. 750, et seq.; *De Cussy, Droit Maritime*, liv. 2, ch. 37.)



§ 21. We have stated, in another chapter, that when a state is desolated by a protracted civil war, foreign interference, by way of pacific mediation, in order *to stay the effusion of blood*, is not only justifiable, but is sometimes a duty imposed by humanity. But will the general interests of humanity justify interference to the extent of *war* of intervention? "This ground of intervention," says Phillimore, "urged on behalf of the general interests of humanity, has been frequently put forward, and especially in our own times, but rarely, if ever, without others of greater and more legitimate weight to support it; such, for instance, as the danger accruing to other states from the continuance of such a state of things, or the right to accede to an application from one of the contending parties. As an accessory to others, this ground may be defensible, but, as a substantive and solitary justification of intervention in the affairs of another country, it can scarcely be admitted into the code of international law, since it is manifestly open to abuses, tending to the violation and destruction of the vital principles of that system of jurisprudence." As stated in the preceding paragraph, this reason occupied a prominent place among those alleged to justify the intervention of the allies between Turkey and her Greek subjects, in 1827. It also, undoubtedly, had its influence with other reasons, such as the general peace of Europe, and the preservation of the balance of power, in justifying the intervention of Great Britain, Austria, Russia, Prussia, and France, in the Belgian revolution of 1830. (*Grotius, de Jur. Bel. ac Pac.*, liv. 2, ch. 20, § 40; *Phillimore, On Int. Law*, vol. 1, §§ 294, et seq.; *Heffter, Droit International*, §§ 44-46; *State Papers, English, on Belgium*, 1830-31, p. 35; *State Papers, English, on Greece*, 1826-32, p. 98; *Hansard, Parl. Debates*, vol. 28, pp. 1133-1163; *Wheaton, Hist. Law of Nations*, pp. 538, et seq.; *Martens, Nouv. Recueil*, tome 1, p. 70.)

§ 22. These various grounds, upon which wars of intervention in the internal affairs of states were formerly attempted to be justified, are now abandoned by the best modern writers on international law, and the present rule is, that stated in another chapter: "No government has a right to interfere in the affairs of another government, *except in the case where the security and immediate interests of the first government are compromised.*"

But this rule may seem vague and unsatisfactory, for who is to judge when internal security and independence is so threatened as to justify a resort to armed intervention? This question must be resolved upon the general principles upon which war, in any case, is justified. There certainly could be no doubt in the case, where one state establishes a form of government which is built upon professed principles of hostility to the government of every other country, and attempts, or prepares to attempt, to force its dogmas upon others, thereby disturbing the peace of nations. "It may be admitted," says Phillimore, "that Venice, in 1298, Great Britain, in 1649, France, both in 1789 and after the succession of the Cavaignac administration, in 1848, and after the last revolution in 1851, were entitled, upon the principles of national independence, and without the intervention of foreign states, to make the great changes in their respective constitutions which were effected at those periods, because such changes concerned themselves alone. Why, then, cannot the same remark be applied to the French revolution in the year 1792? The answer is to be found in the decree promulgated by the convention on the 19th of November, 1792." That decree not only authorized, but ordered the generals of the French armies to render succor and assistance to the citizens of all other states who wished to recover their liberty, or, who were, or might be troubled (*vexés*,) for the sake of liberty. This declaration was regarded as a declaration of war, of the worst and most hateful kind, and those who had hitherto remained strictly neutral, now armed for "that long, bloody, terrible, and universal war, which shook, not only Europe, but the world, to its centre, and of which the wounds are not yet healed." The intervention of France and the allies in the internal affairs of Spain in 1823, was attempted to be defended upon the same grounds as that of England and the allies in the affairs of France in 1792; but the cases were essentially different, and the plea of self-security was evidently a pretext rather than a justifiable reason. "England," said Mr. Canning, "had made war against France, not because she had altered her own government, or even dethroned her own king, but because she had invaded Geneva, Savoy, and Avignon; because she had overrun Belgium,

and threatened to open the mouth of the Scheldt in defiance of treaties; and because she openly announced, and acted upon the determination to revolutionize every adjoining state." But Spain, in 1828, had simply changed her constitution, limiting the power of the crown. She had not declared war against others, nor had she attempted either to seize or to revolutionize the territory or governments of other states. Nevertheless, a war of intervention was determined on, on account of the alleged danger from the spread of democratic principles, and France was supported in this determination by Austria, Prussia, and Russia; but the public voice of England was strongly opposed to the war, and although the ministry did not deem it proper to oppose this intervention by actual force, they did not fail to condemn it in the strongest terms. Lord Brougham attacked the conduct of these powers in a speech of extraordinary power and vigor. "To judge," said he, "of the danger of the principles now shamelessly promulgated, let every one read attentively, and, if he can, patiently, the notes presented by Austria, Prussia, and Russia, to the Spanish government. Can anything more absurd and extravagant be conceived? In the Prussian note the constitution of 1812, restored in 1820, is denounced as a system which, confounding all elements and all power, and assuming only the principle of a permanent and legal opposition to the government, necessarily destroyed that central and tutelary authority which constitutes the essence of the monarchical system.' The emperor of Russia, in terms not less strong, called the constitutional government of the Cortez, 'laws which the public reason of all Europe, enlightened by the experience of ages, has stamped with the disapprobation of the public reason of Europe.' What is this but following the example of the autocrat Catharine, who first stigmatized the constitution of Poland, and then poured her hordes to waste province after province, and finally hewed her way to Warsaw through myriads of unoffending Poles, and then ordered *te deum* to be sung for her success over the enemies of Poland. Such doctrines, promulgated from such quarters, are not only menacing to Spain, they threaten every independent country, they are leveled at every free constitution. Where is the

right of interference to stop, if these armed despots, these self-constituted judges, are at liberty to invade independent states, enjoying a form of government different from their own, on pretense of the principle on which it is founded, being not such as they approve, or which they deem dangerous to the frame of society established among themselves." (*Vide Ante*, chapter iv; *Vattel, Droit des Gens*, prelim., § 22; liv. 1, ch. 23, § 288; *Phillimore, On Int. Law*, vol. 1, §§ 889, 890; *Manning, Law of Nations*, pp. 97, 98; *Alison, Hist. of Europe*, second series, ch. 12, §§ 32-40; *Hansard, Parl. Debates*, vol. 8, pp. 46, 64, 242, 890; *Heffter, Droit International*, §§ 44-46; *Brougham, The Works of*, vol. 9, p. 279; *Wheaton, History Law of Nations*, p. 519; *De Cussy, Precis Historique*, ch. 4.)

§ 23. *A public war* is one carried on under the direction, or, at least, with the sanction of the supreme authority of the state. "If it is declared in form," says Wheaton, "or is duly commenced, it entitles both the belligerent parties to all the rights of war against each other. The voluntary or positive law of nations make no distinction in this respect, between a just and an unjust war. A war in form, or duly commenced, is to be considered, as to its effects, as just on both sides. Whatever is permitted by the laws of war to one of the belligerent parties, is equally permitted to the other." (*Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 7; *Grotius, de Jur. Bel. ac Pac.*, lib. 1, cap. 3, § 1; *Burlamaqui, Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 8; *Kent, Com. on Am. Law*, vol. 1, p. 55; *Vattel, Droit des Gens*, liv. 3, ch. 4, § 64; *Wheaton, Elem. Int. Law*, pt. 4, ch. 1, § 6; *Ortolan, Diplomatie de la Mer*, tome 1, ch. 1; *Bello Derecho Internacional*, pt. 2, cap. 1, § 1.)

§ 24. *A private war* is one carried on by individuals, or united bodies of individuals, without the authority or sanction of the state of which they are subjects. Such contests may take place between individuals of the same state, or of different states. The first are not the objects of international law, but of the local laws and jurisdiction of the particular state. The second, may, or may not, belong to international jurisprudence, according to the circumstances of each particular case. As has already been said, every state is, in gene-

ral, responsible for the acts of its subjects while within its control and jurisdiction; so, also, is it bound to protect its subjects in all their just rights, and to procure indemnity for any wrongs that may be inflicted on them. But the acts of private individuals, whether citizens or foreigners, are, as a general rule, to be judged of and punished by the tribunals, and according to the laws of the place where they are committed. Grotius has devoted considerable space to prove that some kinds of private war are not repugnant to the law of nature, and therefore may be lawfully waged. But his reasoning is not applicable to the present system of international jurisprudence. (*Grotius, de Jur. Bel. ac Pac.*, lib. 1, cap. 3, § 1; *Vattel, Droit des Gens*, liv. 3, ch. 4, § 67; *Bello, Derecho Internacional*, pt. 2, cap. 1, § 1; *De Felice, Droit de la Nature*, etc. tome 2, lec. 22; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 7; *Burlamaqui, Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 3.)

§ 25. A contest by force between different members of the same society or state, has sometimes been called a *mixed war*. Grotius regards such a war as *public* on the side of the established authorities, and *private* on the part of those who resist such authorities. Such a contest, on the part of individuals against the established government, may be a mere insurrection or rebellion, and the acts of such *individual* insurgents, or rebels, in resisting or opposing the authority of the government, may, as already stated, be punished according to the municipal law which they have violated; but where the contest assumes the character of a *public war*, as defined and recognized by the law of nations, it is the general usage for other states to concede to both parties the rights of war, so far as regards the law of blockades, of contraband, etc. It must be remembered, however, that every insurrection or rebellion is by no means a public war, and a state which recognizes it as such, does so under the responsibilities which are imposed by the laws of international comity. It should, also, be remarked that, in such cases, belligerent rights may be superadded to those of sovereignty, that is, the contending parties may exercise belligerent rights with regard to each other and to neutral powers, while, at the same time, the established government of the state may exercise its right of

sovereignty in punishing, by its municipal laws, individuals of the insurgent or revolting party, as rebels and traitors. (*Grotius, de Jur. Bel. ac Pac.*, lib. 1, cap. 3, § 1; *Vattel, Droit des Gens*, liv. 2, ch. 4, § 56; *Wheaton, Elem. Int. Law*, pt. 1, ch. 2, § 7; pt. 4, ch. 1, § 7; *De Felice, Droit de la Nat.*, etc., tome 2, léc. 22; *Bello, Derecho Internacional*, pt. 2, cap. 10, § 1; *Burlamaqui, Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 3; *Rose v. Himeley*, 4 *Cranch. Rep.*, pp. 272, 273.)

§ 26. Hostile collisions of states have sometimes been divided into *perfect* and *imperfect* wars. A *perfect* war is where the whole state is placed in the legal attitude of a belligerent toward another state, so that every member of the one nation is authorized to commit hostilities against every member of the other, in every place, and under every circumstance, permitted by the general laws of war, and subject only to the limitations and exceptions prescribed by such laws. An *imperfect* war is limited, as to places, persons, and things. Such was the character of the hostilities authorized by the United States against France in 1798. (*Polson, Law of Nations*, sec. 6; *Wheaton, Elem. Int. Law*, pt. 2, ch. 1, § 13; *Miller v. Ship Resolution*, 2 *Dallas Rep.*, p. 21; *Bas v. Tingy*, 4 *Dallas Rep.*, p. 37; *Manning, Law of Nations*, pp. 94, 95; *Wildman, Int. Law*, vol. 2, p. 8; *Burlamaqui, Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 2.)

§ 27. Grotius divides public wars into *solemn wars* and *wars non-solemn*. The former includes all those which are waged under the authority of the state, and are duly commenced or declared in form. Both the authority and the formality are requisite to constitute a solemn war. "But a public war, less solemn," says Grotius, "may be without those formalities, (of a solemn war,) and be made against private men, and have for its authority any magistrate. And, indeed, if we consider the thing without respect to the civil law, every magistrate seems to have the power of making war, as in the defense of the people entrusted to him, so, also, to exercise that jurisdiction, if violence be offered. But, since by war the whole city, or state, is endangered, therefore it is provided, by the laws of almost all nations, that war be not made but by the authority of him who has the sovereign power in the state. There is such a law in Plato's last book, *de Legi-*

*bus.* And, by the Roman laws, he was reckoned guilty of high treason, who, with commission from the prince, presumed to make war, muster soldiers, or raise an army. And the *Cornelian law*, enacted by L. Cornelius Sylla, says: 'Without commission from the people.' In the code of Justinian there is a constitution extant, made by Valentinian and Valens, thus: 'Let no man dare to raise an army without our knowledge and advice.' To this we may refer that of St. Austin, 'natural order, accommodated to the peace of mankind, requires this, that the authority and council of raising war should be in the power of princes. \* \* But if the danger be so pressing, that time will not allow to consult the supreme magistrate, here necessity grants an exception. L. Pinarius, governor of Enna, a Sicilian garrison, presuming on this right, upon certain information, that the townsmen designed to revolt to the Carthaginians, preserved the place by putting them to death. Franciscus de Victoria has pretended to transfer the right of making war to the citizens even beyond such a necessity, to revenge those injuries which the king neglects to adjust, but his opinion is justly rejected by others.' " (*Burlamaqui, Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 3; *De Felice, Droit de la Nat., etc.*, tome 2, lec. 22; *Hale, Pleas of the Crown*, vol. 1, p. 162; *Grotius, De Jur. Bel ac Pac.*, lib. 1, cap. 3, § 4; *Puffendorf, Jus. Nat. et Gent.*, lib. 8, ch. 6, § 9; *Wildman, Int. Law*, vol. 3, p. 3; *Phillimore, On Int. Law*, vol. 2, § 66.)

§ 28. The question has sometimes arisen how far the hostile acts of a subordinate officer, as, for instance, the governor of a province, is to be regarded as the act of his sovereign or state; and how far the officer is to be held individually responsible. The most approved and reasonable doctrine is that, if the act is ratified by his government, or rather, is not disclaimed, the government is responsible; otherwise, it becomes an individual act, and the guilty party should be surrendered up for punishment. Burlamaqui says: "A mere presumption of the will of the sovereign would not be sufficient to excuse a governor, or any other officer, who should undertake a war, *except in the case of necessity*, without either a general or a particular order." \* \* \* "Whatever part the sovereign would have thought proper to act, if he had been consulted,

and whatever success the war undertaken without his order may have had, it is left to the sovereign whether he will ratify or condemn the act of the minister. If he ratifies it, this approbation renders the war solemn, by reflecting back, as it were, an authority upon it, so that it obliges the whole commonwealth. But if the sovereign condemn the act of the governor, the hostilities committed by him ought to pass for a sort of robbery, the fault of which, by no means, affects the state, provided the governor is delivered up or punished according to the laws of the country, and proper satisfaction be made for the damage sustained." (*Burlamaqui, Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 3; *The People v. McCloud*, 25 *Wendell, Rep.*, p. 552; *Puffendorf, Jus Nat. et Gent.*, lib. 8, cap. 6, §§ 10, 11; *De Felice, Droit de la Nat., etc.*, tome 2, lec. 22.)

§ 29. Vattel divides all hostile collisions between nations, into "two sorts of wars, *lawful and unlawful*." Unlawful wars are those undertaken "without apparent cause," and for "havoc and pillage," and all which do not come under this head are classed as lawful wars. Unlawful wars are such as were waged by the "Grandes compagnies," which had assembled in France during the wars with the English; armies of banditti which ranged about Europe purely for spoil and plunder. Such were the cruises of the *fillibusters*, without commission, and in time of peace; and such, in general, are the depredations of pirates. To the same class belong almost all the expeditions of the African corsairs, though authorized by a sovereign, they being founded on no apparent just cause, and whose only motive is the avidity of captures. I say these two sorts of war, *lawful and unlawful*, are to be carefully distinguished, their effects, and the rights arising from them, being very different. (*Vattel, Droit des Gens*, lib. 3, ch. 4, § 67; *Tallmadge, Review, etc.*, 26 *Wendell, Rep.*, p. 668; *De Felice, Droit de la Nat. et des Gens*, tome 2, lec. 22.)

§ 30. Writers on international jurisprudence very properly distinguish between *unlawful* and *unjust* wars. Where the war is duly declared or begun, and carried on by the proper authority of the State, it is a lawful war, and, by the voluntary law of nations, is regarded as a just war so far as the belligerent rights of the parties are concerned. Vattel com-



poses the State that carries on an unjust war to the individual who refuses to pay his honest debts, on the ground of prescription. This rule of civil law is made for the general benefit of community, although it may at times enable the individual to offend against his duty. So of the law of nations. In order to avoid, as far as possible, the evils of human society, it is agreed to regard every lawfully declared war as just on both sides. But, says Vattel, "We are never to forget that this voluntary law of nations, which is admitted from necessity, and to avoid greater evils, *does not give to him whose arms are unjust a genuine right, capable of justifying his conduct, and acquitting his conscience, but only the external effect of the law, and impunity among men.*" (Vattel, *Droit des Gens*, liv. 3, ch. 12, §§ 188–192; Burlamaqui, *Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 3; Bello, *Derecho Internacional*, pt. 2, cap. 1, § 2; Heffter, *Droit International*, § 119; De Felice, *Droit de la Nat., etc.*, tome 2, lec. 22.)

§ 81. It has already been shown, in speaking of seizures and reprisals, that the hostile acts of individuals, when ratified and assumed by their government, are to be regarded as the hostile acts of the state. These acts may be of the character of reprisals, or of mixed or imperfect war, or of a virtual declaration and commencement of solemn war. Such acts, however, must not exceed what the laws of war have established as belligerent rights of the subjects of hostile states. For anything done in violation of the laws of war, the individual is liable to punishment. So, also, for any act within the rules of war, not authorised or assumed by his government, as the act of the state. The distinction between the two cases is manifest, and should never be lost sight of; the latter is punishable by the rules of civil law, while the former is an offense against the law of nations, punishable only by the laws and usages of war. The taking of property, and of human life, in the one case, would be robbery and murder, punishable under the local laws; while in the other case, the same acts might be fully justifiable as the lawful exercise of belligerent rights under the law of nations. (*Vide Ante*, chap. 12; *See Opinions U. S. Att'ys Genl.*, vol. 1, p. 81; *Carrington et al. v. C. Ins. Co.*, 8 *Peters Rep.* p. 522; *Tallmadge Review, etc.*, 26 *Wendell Rep.*, App., p. 674; Vattel, *Droit*

*des Gens*, liv. 8. ch. 2, § 187; *Rutherforth, Institutes*, b. 2, ch. 9, § 18; *Burlamaqui, Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 8; *Phillimore, On Int. Law*, vol. 3, §§ 38, 92; *Thorshaven and its Depend.*, 1 *Edw. Rep.* p. 102; *Brown v. The United States*, 8 *Cranch. Rep.*, pp. 132–134; *Heffter, Droit International*, § 119.)

## CHAPTER XV.

## DECLARATION OF WAR AND ITS EFFECTS.

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§ 1. The right of making war, as well as the right of authorizing retaliations, reprisals, and other forcible means of settling international disputes, belongs, in every civilized nation, to the *supreme power of the state*, whatever that supreme power may be, or however it may be constituted. As states are known to each other only through their constituted

authorities, so all their relations, whether peaceful or hostile, must be settled by their recognized governments. They cannot be legally changed or interfered with by individuals. But this supreme power, originally resident in the body of the nation, may be made up of different elements, which are divided and limited according to the will of the nation, and it is only from the particular institution, or fundamental laws of each state, that we are to learn where the power resides which is authorized to make war in the name of the society at large. In the ancient republics of Greece and Italy, and among the ancient Germans, it resided with the people in their collective capacity. In England and other monarchical governments of Europe, it is vested in the crown. In the United States it is confided to the federal legislature. Where it resides with the people and is retained by them as a portion of sovereign power, it must be exercised by them in their collective capacity as provided by constitutional law, and neither individuals, nor bodies of individuals, less than the sovereign authority of the entire state, can authorize the making of a public war. Nevertheless a subordinate or local officer, as will hereafter be shown, may commence hostilities in certain cases, his acts being subsequently ratified by the proper authority, as was the case with General Taylor on the Rio Grande, in the war of 1846 between the United States and Mexico. (*Polson, Law of Nations*, sec. 6; *Phillimore, On Int. Law*, vol. 3, §§ 49–50; *Chitty, Law of Nations*, p. 28; *Ortolan, Diplomatie de la Mer*, tome 2, liv. 3, ch. 1; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 7; *Kent Com. on Am. Law*, vol. 1, pp. 51, 52, 60; *Wheaton, Elem. Int. Law*, pt. 4, ch. 1, § 5; *Martens, Precis du Droit des Gens*, § 260; *Vattel, Droit des Gens*, liv. 3, ch. 1, § 4; *Puffendorf, de Jur. Nat. et Gent.*, lib. 8, cap. 6, § 10; *Potter, Antiquities of Greece*, b. 3, c. 7; *Tacitus, de Moribus Germanicæ*, cap. 11; *Cicero, de Off.*, lib. 1, cap. 11; *de Repub.*, lib. 2, c. 17.)

§ 2. It was customary, in former times, to precede hostilities by a public declaration, communicated to the enemy. This was always done by the ancient Greeks and Romans. The latter first sent the chief of the *feciales*, called the *pater-patratus*, to demand satisfaction of the offending nation; and if, within the space of thirty-three days, no satisfactory answer

was returned, the herald called the gods to witness the injustice, and came away, saying that the Romans would consider upon the measures to be adopted. The matter was then referred to the senate, and, when the war was resolved on, the herald was sent back to the frontier to make declaration in due form. Invasions, without such public notice, were looked upon as unlawful, and no nation was regarded as an enemy of the Roman people until war was thus publicly declared against it. By such scrupulous delicacy, says Vattel, in the conduct of her wars, Rome laid a most solid foundation for her subsequent greatness. During the middle ages, and even as late as 1635, a declaration of war to the enemy, previous to beginning hostilities, was generally made, and, indeed, was required by the laws of honor and chivalry. (*Kent, Com. on Am. Law*, vol. 1, p. 53; *Wheaton, Elem. Int. Law*, pt. 4, ch. 1, § 8; *Vattel, Droit des Gens*, liv. 3, ch. 4, § 51; *Potter, Antiquities of Greece*, b. 3, c. 7; *Livy, Hist.*, lib. 1, cap. 21; *Emerigon, Traité des Assurances*, ch. 12, sec. 85; *Manning, Law of Nations*, pp. 118, 119; *Clarendon, Hist., Reb.*, vol. 1, p. 40; *Ortolan, Diplomatie de la Mer*, tome 2, ch. 1; *Garden, De Diplomatie*, liv. 6, § 5; *Wildman, Int. Law*, vol. 2, pp. 3-5; *De Felice, Droit de la Nat., etc.*, tome 2, lec. 23.)

§ 3. But, in modern times, the practice of a formal declaration to the enemy has fallen into entire disuse, the belligerents limiting themselves to a public declaration within their own territories and to their own people. The latest example of a public declaration to the enemy, was that of France against Spain, at Brussels, in 1785, by heralds at arms, according to the forms observed during the middle ages. For a long time, however, writers on public law were divided in opinion with respect to the propriety of the modern practice of commencing war without any formal declaration to the enemy. Grotius, Puffendorf, Valin, Emerigon and Vattel, think that such declaration should be made, while Bynkershoek, Heniccius, and more recent writers, maintain that, although such declaration may very properly be made, yet it cannot be required as a matter of right. There is nothing in international jurisprudence, as now practiced, to render such declaration obligatory, and the present usage entirely dispenses with it. All, however, agree that there should be some manifesto, declara-

tion, or publication made within the territory of the state which declares the war, announcing the existence of hostilities; and such manifesto, or publication, usually sets forth the motives for commencing the war. Some such formal act, proceeding from the competent authority, seems necessary in order to announce to the people at home, and to apprise neutral nations of, the war, for their instruction and direction in respect to their intercourse with the enemy. "Without such a declaration," says Wheaton, "it might be difficult to distinguish, in a treaty of peace, those acts which are to be accounted lawful effects of war, for those which either nation may consider as naked wrongs, and for which they may, under certain circumstances, claim reparation." Moreover neutral states have a right to know, by some formal and authoritative act, that hostilities exist in form as well as in fact, on account of the interests of their own subjects, whose duties and relations to the belligerents are essentially changed by the new condition of things. It is not material under what form such notice is given, whether by proclamation, or by a mere act of the legislative branch of the government. Thus, in the war of 1812, between the United States and Great Britain, hostilities immediately commenced as soon as Congress had passed the act, without waiting to communicate the fact either to England or to neutral states. (*Grotius, de Jur. Bel. ac Pac.*, lib. 3, cap. 3, § 5; *Wheaton, Elem. Int. Law*, pt. 4, ch. 1, § 8; *Bynkershoek, Quaest. Jur. Pub.*, lib. 3, cap. 2; *Rutherford, Institutes*, b. 2, ch. 9, §§ 10, 15; *Vattel, Droit des Gens*, liv. 3, ch. 4, §§ 51–56; *Klüber, Droit des Gens*, §§ 238, 239; *Kent, Com. on Am. Law*, vol. 1, p. 54; *Emerigon, Traité des Assurances*, ch. 12, § 35; *Heineccius, Elementa Juris Nat. et Gent.*, lib. 2, § 198; *Hautefeuille, des Nations Neutres*, tit. 3, ch. 1; *Wildman, Int. Law*, vol. 2, pp. 5–8; *Polson, Law of Nations*, sec. 6; *Phillimore, on Int. Law*, vol. 3, §§ 51, et seq.; *The Noyade*, 4 *Rob. Rep.*, p. 253; *The Eliza Ann*, 1 *Dod Rep.* p. 247; *Chitty, Law of Nations*, pp. 28, et seq.; *Manning, Law of Nations*, p. 119; *Ortolan, Diplomatie de la Mer*, tome 2, liv. 3, ch. 1; *Rayneval, Inst. du Droit Nat., etc.*, liv. 3, ch. 3; *Garden, de Diplomatie*, liv. 6, § 6; *Bello, Derecho Internacional*, pt. 2, cap. 1, § 4; *Heffter, Droit International*, §§ 119–121; *Burlamaqui, Droit, de la Nat. et des Gens*, tome 5, pt. 4, ch. 4; *De Cussy, Droit Maritime*, liv. 1, tit. 3, §§ 3, 4.)

§ 4. Notwithstanding a very general accordance, in modern wars, with the doctrine of unilateral declaration, there are quite a number of instances where wars between the most civilized nations have been commenced and carried on without a formal declaration of any kind. But these instances have generally resulted from peculiar circumstances, which rendered, or seemed to render, a public declaration unnecessary or inconvenient; they are, therefore, exceptions to the general rule established by modern usage. Thus, the war of 1846, between the United States and Mexico, was commenced by a conflict of armed forces on the disputed territory, and without any declaration on either side. The congress of the United States immediately passed an act recognizing the existence of the war. The war of 1792, between France and Great Britain, was preceded by no formal declaration; the British ambassador was withdrawn, and the French ambassador dismissed, whereupon the National Assembly of France passed a vote of war and the seizure of British property. Phillimore deems this proceeding to have been "perfectly justifiable *in point of form*." So, also, the war of 1778, between the same powers, was commenced without any formal declaration on either side, the treaty of alliance between France and the revolted English colonies of North America, being deemed, in itself, sufficient to justify hostilities on the part of Great Britain. History affords other examples of the same kind. Even admitting the views of Hautefeuille, that such wars are violations of the law of nations, so far as concerns the failure to make a formal declaration, it will hardly be contended that all the belligerent acts of the parties, during the continuance of the war, are, of consequence, illegal, and violations of international jurisprudence. It is, therefore, necessary to fix a time when the war is to be regarded as regular or formal. This is no easy matter, different solutions of the question have been proposed, the most sensible of which is the rule that, in such cases, the legitimate consequences of war flow directly from the state of public hostilities, and that the effects which the voluntary law of nations attributes to solemn war date, with respect to belligerent rights, from the commencement of such hostilities, and, with respect to neutral duties, from an official announcement, or

a positive knowledge of the existence of the war. (*Bello, Derecho Internacional*, pt. 2, cap. 1, § 4; *Heffler, Droit International*, §§ 119–121; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 9; *Hautefeuille, Des Nations Neutres*, tit. 3, ch. 1; *Wheaton, Elem. Int. Law*, pt. 4, ch. 1, § 8; *Kent, Com. on Am. Law*, vol. 1, p. 55; *Phillimore, On Int. Law*, vol. 3, §§ 51, et seq.; *Wildman, On Int. Law*, vol. 2, pp. 5–8; *Manning, Law of Nations*, p. 120; *Moser, Versuch, etc.*, b. 18, cap. 2, § 4; *De Cussy, Droit Maritime*, liv. 1, tit. 3, § 4; *The Eliza Ann*, 1 *Dod. Rep.*, p. 247.)

§ 5. Declarations of war may be either *absolute* or *conditional*. Hostilities result at once from the former, and the two nations are regarded as belligerents from the date of the declaration. But the demand of the one power upon the other may be accompanied by a notification that hostilities will be commenced unless satisfaction upon some matter specified be obtained immediately, or within a certain limited time. In this case the war dates from the commencement of hostilities. Sometimes, however, it is very difficult, in such cases, to fix the exact point where belligerent rights begin, and when the duties of neutrals, and the obligations of subjects, incident to the new relations of the two states, have commenced. The rule given in the preceding paragraph applies also to cases of conditional declaration. (*Grotius, de Jur. Bel ac Pac.*, lib. 3, cap. 3, § 7; *Vattel, Droit des Gens*, lib. 3, ch. 4, § 53; *Emerigon, Traité des Assurances*, ch. 12, sec. 25, § 4; *Bello, Derecho Internacional*, pt. 2, cap. 1, § 4; *The Success*, 1 *Dod. Rep.*, p. 133; *Ortolan, Diplomatie de la Mer*, tome 2, liv. 3, ch. 1; *Heffler, Droit International*, §§ 120, 121; *De Felice, Droit de la Nat., etc.*, tome 2, lec. 23.)

§ 6. If the enemy, says Vattel, on either declaration offers equitable conditions of peace, the war is to be suspended, for whenever justice is done all right of employing force is superseded. To these offers, however, are to be added good and sufficient securities, for we are under no obligations to suffer ourselves to be amused by empty proposals. Moreover, we have a right to demand security, not only for the principal objects for which hostilities were declared, but also for the expenses incurred in making preparations for the war. The nature of this security will depend upon the pecu-



liar circumstances of the case, or the confidence we are willing to repose in the word of the enemy. If the war was declared for the recovery of territory unjustly withheld from us, its immediate surrender would satisfy the main object of the declaration. (*Vattel, Droit des Gens*, liv. 3, ch. 4, § 54; *Ortolan, Diplomatie de la Mer*, tome 2, liv. 3, ch. 1; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 9.)

§ 7. Although Vattel strenuously insists upon the ancient rule, that the declaration of war must, in general, be communicated to the state against which it is made, he makes the case of a war strictly defensive an exception. He who is attacked, he says, and wages only a defensive war, need not make a formal declaration, as the state of war is sufficiently determined by the declaration or conduct of the enemy. Nevertheless, the nation which is attacked seldom omits to make such declaration, either from a sense of its own dignity, or for the information of its own subjects and of neutral states. It has already been shown that modern usage does not absolutely require a formal declaration in any case, *ex debito justitiæ inter gentes*, although some public act, recognizing the existence of the war, may be required by public or municipal law, in order to determine the duties and relations of the subjects of the belligerents. Such recognition seems as necessary in a defensive as in an offensive war. Thus, when Sweden, in 1812, had declared war against Great Britain, and the British government had neither issued a counter-declaration nor caused any official declaration to be made to its own subjects, Sir William Scott said it might be a question of nicety to determine how far the Swedish proclamation "would affect the rights of British subjects to carry on their accustomed intercourse with the ports of Sweden." (*Vattel, Droit des Gens*, liv. 3, ch. 4, § 57; *Kent, Com. on Am. Law*, vol. 1, p. 55; *The Success*, 1 *Dod. Rep.*, p. 133; *Phillimore, on Int. Law*, vol. 3, § 66; *Garden, De Diplomatie*, liv. 6, § 6; *Wildman, Int. Law*, vol. 2, pp. 5-8; *Heffler, Droit International*, § 120; *Bello, Derecho, Internacional*, pt. 2, cap. 1, § 4; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 9; *De Cussy, Droit Maritime*, lib. 1, tit. 3, § 4.)

§ 8. A war duly declared, or officially recognized, is not merely a contest between the governments of the hostile

states in their political character or capacity; on the contrary, its first effect is to place every individual of the one state in legal hostility to every individual of which the other is composed, and these individuals retain the legal character of enemies, in whatever country they may be found. In the next place, all the property of the one state, and of each of its citizens, is deemed hostile with respect to the opposing belligerent. Very important consequences, as to the rights of persons and property, are deducible from these principles. We here allude only to the general doctrine of the effects of a declaration of war; the limitations and modifications of this doctrine, by usage and constitutional law, will be discussed in another place. (*Wheaton, Elem. Int. Law*, pt. 4, ch. 1, § 13; *Vattel, Droit des Gens*, liv. 3, ch. 5, § 70; *The Hoop*, 1 *Rob. Rep.*, p. 198; *Manning, Law of Nations*, p. 122; *Kent, Com. on Am. Law*, vol. 1, p. 55; *Phillimore, On Int. Law*, vol. 3, § 67; *Bynkershoek, Quaest. Jur. Pub.*, lib. 1, cap. 3; *Wildman, Int. Law*, vol. 2, pp. 8–10; *Heffter, Droit International*, § 122; *Burlamaqui, Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 4.)

§ 9. One of the immediate and important consequences of this principle, which has been fully confirmed by the usages of modern warfare, and by the decisions of the judicial tribunals of Europe and the United States, is, that a declaration, or recognition of war, effects an absolute interruption and interdiction of all commercial intercourse and dealings between the subjects of the two countries. The idea, says Kent, that any commercial intercourse, or pacific dealing, can lawfully subsist between the people of the powers at war, except under the clear and express sanction of the government, and without a special license, is utterly inconsistent with the duties growing out of a state of war. It is a well settled doctrine, in the English courts, and with the English jurists, that there cannot exist, at the same time, a war of arms and a peace of commerce. The war puts an end at once to all dealings and all communications with each other. This is equally the doctrine of all the authoritative writers on the law of nations, and of the maritime ordinances of all the great powers of Europe. It was frequently so decided by the congress of the United States, during the revolutionary war, and, again,

by the supreme court of the United States during the war of 1812. This doctrine renders null and void all contracts with the enemy during the war; it makes illegal the insurance of enemy's property, prohibits the drawing of bills of exchange, by an alien enemy on a subject of the adverse government, the purchase of bills on the enemy's country, or the remission and deposit of funds there, and the remission of money or bills to subjects of the enemy. All endeavors at trade with the enemy, by the intervention of third persons, or by partnerships, are equally forbidden, and no artifice can legalize any trade, communication, or contract of whatsoever character, without the express permission of the government. The subjects of the belligerent states cannot commence or carry on any correspondence or business together, and all commercial partnerships, existing between the subjects of the two parties prior to the war, are dissolved by the mere force and act of the war itself; though other contracts, existing prior to the war, are not extinguished, but the remedy is only suspended, and this from the inability of an alien enemy to sue, or to sustain, in the language of the civilians, a *persona standi in judicio*. (Kent, *Com. on Am. Law*, vol. 1, pp. 66, 68; Wheaton, *On Captures*, pp. 220-223; Phillimore, *On Int. Law*, vol. 3, § 70; Bynkershoek, *Quaest. Jur. Pub.*, lib. 1, cap. 3; Wheaton, *Elem. Int. Law*, pt. 4, ch. 1, §§ 13, 15; *The Indian Chief*, 3 Rob. Rep., p. 22; *The Pieter*, 4 Rob., Rep. p. 49; *The Franklin*, 6 Rob. Rep., p. 127; *The Joseph*, 8 Cranch. Rep., pp. 451, 455; Chitty, *Law of Nations*, pp. 2, 3; Manning, *Law of Nations*, pp. 122, 123; Wildman, *Int. Law*, vol. 2, pp. 8-10; Heffter, *Droit International*, §§ 122, 128; *The Hoop*, 1 Rob. Rep., p. 196; *The Rapid*, 8 Cranch. Rep., p. 155.)

§ 10. "This strict rule," says Kent, "has been carried so far in the British admiralty, as to prohibit a remittance of supplies even to a British colony during its temporary subjection to the enemy, and when the colony was under the necessity of supplies, and was only partially and imperfectly supplied by the enemy. The same interdiction of trade applies to ships of truce, or cartel ships, which are a species of neutral navigation, intended for the recovery of the liberty of prisoners of war. Such a special and limited intercourse is dictated by policy and humanity, and it is indispensable

that it be conducted with the most exact and exclusive attention to the original purpose, as being the only condition upon which the intercourse can be tolerated. All trade, therefore, by means of such vessels, is unlawful, without the express consent of both the governments concerned." A case occurred during the war of 1812, between the United States and Great Britain, and was decided by the American courts, showing the rigor of this rule of non-intercourse. A citizen of the United States had purchased a quantity of goods within British territory, a long time previous to the declaration of hostilities, and had deposited them on an island near the frontier; upon the declaration of war, his agents hired a vessel to proceed to the place of deposit and bring away the goods; but, on her return, she was captured, and, with her cargo, condemned as a prize of war. (*Chitty, Law of Nations*, pp. 6, 7; *Kent, Com. on Am. Law*, vol. 1, p. 66; *Wheaton, Elem. Int. Law*, pt. 4, ch. 1, § 13; *The Rapid*, 8 *Cranch. Rep.*, p. 155; *Potts v. Bell*, 8 *Term Rep.*, p. 548; *The Venus*, 4 *Rob. Rep.*, p. 355; *The Carolina*, 6 *Rob. Rep.*, p. 336; *The Bella Guiditta*, cited, 1 *Rob. Rep.*, p. 147.)

§ 11. The only exceptions to this strict and rigorous rule of international jurisprudence, are "contracts of necessity, founded on a state of war, and engendered by its violence." All ransom bills come under this exception, as, also, bills of exchange drawn by a prisoner in the enemy's country for his own subsistence. In the case of a bill of exchange drawn upon England, by a British prisoner in France, for his own subsistence, and endorsed to an alien enemy, the latter was allowed to enforce it on the return of peace. (*Kent, Com. on Am. Law*, vol. 1, p. 68; *Wheaton, Elem. Int. Law*, pt. 4, ch. 1, § 15; *Bynkershoek, Quaest. Jur. Pub.*, lib. 1, cap. 21; *Antoine v. Morehead*, 6 *Taunton Rep.*, p. 237.)

§ 12. "It is equally illegal," says Kent, "for an ally of one of the belligerents, and who carries on the war conjointly, to have any commerce with the enemy. A single belligerent may grant licenses to trade with the enemy, and dilute and weaken his own rights at pleasure, but it is otherwise when allied nations are pursuing a common cause. The community of interests, and object, and action, creates a

mutual duty not to prejudice that joint interest; and it is a declared principle of the law of nations, founded on very clear and just grounds, that one of the belligerents may seize and inflict the penalty of forfeiture on the property of a subject of a co-ally engaged in a trade with a common enemy, and thereby affording him aid and comfort, whilst the other ally was carrying on a severe and vigorous warfare. It would be contrary to the implied contract in every such war-like confederacy, that neither of the belligerents, without the other's consent, shall do anything to defeat the common object." Wheaton says that no subject of an ally can trade with the common enemy in a conjoint war, without being liable to the forfeiture, in the prize courts of an ally, of his property engaged in such trade. And that, as the rule with respect to the subjects of the belligerent state can be relaxed only by the permission of the sovereign power of the state; so the rule, with respect to the subjects of allies, can be relaxed only by the permission of the allied nations, according to their mutual agreement. (*Kent, Com. on Am. Law*, vol. 1, p. 69; *Wheaton, Elem. Int. Law*, pt. 4, ch. 1, § 14; *The Neptunus*, 6 *Rob. Rep.*, p. 403; *The Noyade*, 4 *Rob. Rep.*, p. 251; *Phillimore, On Int. Law*, vol. 3, §§ 67, 73; *Bynkershoek, Quaest. Jur. Pub.*, lib. 1, cap. 15; *Chitty, Law of Nations*, pp. 11, 12; *Heffter, Droit International*, §§ 120-123.)

§ 13. One of the immediate consequences of the position in which the citizens and subjects of belligerent states are placed by the declaration of war, is, that all the subjects of one of the hostile powers, within the territory of the other, are liable to be seized and retained as prisoners of war. But this extreme right, founded on the positive law of nations, has been stripped of much of its rigor in modern warfare, by the milder rules resulting from the usage of nations, the stipulations of treaties, and the municipal laws and ordinances of particular states. These affect, more or less, the exercise of this extreme right of war; but the *right* itself still remains, and may, under certain circumstances, be enforced, at the discretion of the belligerent. Bynkershoek mentions several instances arising in the seventeenth, and one as early as the fifteenth century, of stipulations in treaties allowing foreign subjects a reasonable time to withdraw with their effects.

Such stipulations, says Kent, have now become an established formula in commercial treaties. Emerigon considers such treaties as an affirmance of common right, or the public law of Europe. Vattel also says, that the sovereign who declares war cannot detain those subjects of the enemy who are within his dominions, at the time of such declaration, and that they are to be allowed a reasonable time to withdraw, because, by permitting them to enter his territories, he tacitly promised them protection, and security for their return. The current of opinion, however, is in favor of the doctrine that the general right still exists as a rule of law, though its exercise has been limited and modified by usage and conventional law, and by municipal ordinances and regulations. (*Kent, Com. on Am. Law*, vol. 1, p. 56; *Grotius, De Jur. Bel. ac Pac.*, lib. 3, cap. 9, § 4; *Vattel, Droit des Gens*, liv. 3, ch. 4, § 68; *Mably, Le Droit Public, Oeuvres*, tome 4, p. 334; *Phillimore, On Int. Law*, vol. 8, § 75; *Wildman, Int. Law*, vol. 2, p. 12; *Burlamaqui, Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 6; *Emerigon, Traité des Assurances*, ch. 12, sec. 85; *Azuni, Droit Maritime*, pt. 2, ch. 4, art. 2, § 7; *Bynkershoek, Quaest. Jur. Pub.*, cap. 2, § 7; *Manning, Law of Nations*, pp. 124, 125; *De Felice, Droit de la Nat., etc.*, tome 2, lec. 23; *Bello, Derecho Internacional*, pt. 2, cap. 2, § 2; *Heffter, Droit International*, §§ 122, 126; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 10; *De Cussy, Droit Maritime*, liv. 2, ch. 6.)

§ 14. In England it was provided by *magna charta*, that upon the breaking out of war, foreign merchants found in England, and belonging to the country of the enemy, should be attached, "without harm to body or goods," until it be known how English merchants were treated by the enemy. By the statute of 27 Edward III., 17, foreigners were to have convenient warning of forty days, by proclamation, to depart the realm with their goods. The act of congress of July 6th, 1798, authorized the President, in case of war, to direct the conduct to be observed toward subjects of the hostile nation, being aliens and within the United States, and in what case, and upon what security their residence should be permitted; and it declared, in reference to those who were to depart, that they should be allowed such reasonable time as might be consistent with

the public safety, and according to the dictates of humanity and national hospitality, "for the recovery, disposal, and removal of their goods and effects, and for their departure." By the Spanish decree of February, 1829, making Cadiz a free port, it was declared that, in the event of war, foreigners who had established themselves there for the purpose of commerce, and becoming alien enemies by means of the war, were to be allowed a proper time to withdraw, and their property was not to be subject to sequestration. Other nations have made similar decrees and ordinances, substituting a milder rule than the ancient and sterner doctrine of international law; but, however strong the current of modern authority in favor of the milder principle, nevertheless, the ancient and stricter rule must still be regarded as the law of nations; and such has been the decision of the supreme court of the United States. There, however, should be a very strong case in order to justify the exercise of this extreme right, as the spirit of the age is decidedly against it. At the opening of the war of 1803, between France and Great Britain, Napoleon made prisoners of all English subjects traveling in France. The pretext for this exercise of the extreme right of war, was the capture of French vessels in the bay of Audiere by the English prior to the declaration of war, and other violations of maritime law. The law of retaliation would hardly seem to require, or even to justify, a resort to means so unusual and odious, although within the extreme limits fixed by the ancient and severer rules of war. (*Kent, Com. on Am. Law*, vol. 1, pp. 57-59; *Vattel, Droit des Gens*, liv. 3, ch. 4, § 63; *Massé, Droit Comm.*, liv. 2, tit. 1, ch. 2, §§ 1, 2; *Hautefeuille, Droit des Nations*, tome 3, p. 267; *Alison, History of Europe*, first series, vol. 2, p. 270; *Thiers, Hist. du Con. et de l'Empire*, liv. 17; *Las Cases, Memoires de Napoleon*, vol. 7, pp. 32, 33; *Manning, Law of Nations*, pp. 125, 126; *U. S. Statutes at Large*, vol. 1, p. 577; *Bello, Derecho Internacional*, pt. 2, cap. 2, § 2; *Heffter, Droit International*, § 126.)

§ 15. What we have said of the detention of the enemy's person, also holds good with respect to the right to seize and confiscate all enemy's property found within our territory at the commencement of hostilities. In former times, this right

was exercised with great rigor, but it has now become an established, though not inflexible, rule of international law, that such property is not liable to confiscation as a prize of war. This rule, says chief justice Marshall, "like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgement of the sovereign—it is a guide which he follows or abandons at his will; and, although it cannot be disregarded by him without obloquy, yet it may be disregarded. It is not an immutable rule of law, but depends on political considerations, which may continually vary." The supreme court of the United States has decided that we have a right to seize and confiscate all goods of the enemy found in the country, and all vessels and cargoes found afloat in our ports, at the commencement of hostilities; but that this right was vested in congress, and, until some statute, directly applying to the subject, be passed, the courts could not condemn such property; that it would continue under the protection of the law, and might be claimed by the owner on the restoration of peace. We have already stated the ancient law of England which prescribes that, at the commencement of a war, the enemy's merchants, with their goods, were to be treated precisely as the English merchants, with their goods, were treated in the enemy's country. But the modern practice of Great Britain has been far less liberal. "In the recent maritime wars commenced in that country," says Wheaton, "it has been the constant usage to seize and condemn, as droits of admiralty, the property of the enemy found in its ports at the breaking out of hostilities, and this practice does not appear to have been influenced by the corresponding conduct of the enemy in that respect." The English text-writers, down to the beginning of the recent war with Russia, continued to maintain the existence of the right to seize and condemn, not only as a general right of war, but as one which could be exercised by the crown, without any express act of parliament to sanction it. (*Wheaton, Elem. Int. Law*, pt. 4, ch. 1, § 11; *Kent, Com. on Am. Law*, vol. 1, p. 59; *Brown v. The United States*, 8 *Cranch. Rep.*, pp. 123–129; *Manning, Law of Nations*, pp. 124–129; *Klüber, Droit des Gens*, §§ 250–252; *Moser, Versuch*, etc., b. 9, §§ 49–60; *Vattel, Droit des Gens*, liv. 3, ch. 4, § 68;



ch. 5, §§ 76, 77; *De Felice, Droit de la Nature, etc.*, tome 2, lec. 26; *Bello, Derecho Internacional*, pt. 2, cap. 2, § 2; *Heffter, Droit International*, § 126; *De Cussy, Droit Maritime*, liv. 1, tit. 3, § 6.)

§ 16. On the declaration of a war between the Ottoman Porte and Russia, in October, 1858, a notice was issued by the latter government to the effect that, as the Porte had not imposed an embargo on Russian vessels in its ports, etc., the Russian government, on its part, grants liberty to Turkish vessels in its ports to return to their destination till the 10th (22d) of November. After the declaration of hostilities by France and England against Russia, similar declarations were made by these powers. That of France, dated March 27th, 1854, declares: "Article one. Six weeks from the present date are granted to Russian ships of commerce to quit the ports of France. Those Russian ships which are not actually in our ports, or which may have left the ports of Russia previously to the declaration of war, may enter into French ports, and remain there for the completion of their cargoes, until the 9th of May, inclusive." The declaration of England, to the same effect, was dated March 29th, 1854. Still further indulgences were afterward declared to Russian vessels, which had sailed prior to May 15th, 1854, for English and French ports. Russia allowed English and French vessels six weeks from the 25th of April, 1854, to take on board their cargoes and sail from Russian ports in the Black sea, the sea of Azoff, and the Baltic, and six weeks from the opening of navigation, to leave the ports of the White sea. (*Wheaton, Elem. Int. Law*, pt. 4, ch. 1, § 12, note by Lawrence; *Paris Moniteur*, March 28th, 1854; *London Gazette*, 18th April, 1854; *Cong. Doc.*, 33 Cong., H. R. No. 103, p. 5; *Circulaire du Ministre de la Marine, Annuaire, etc.*, 1853-4, app. 5, pp. 913, 926, 928; *Ortolan, Diplomatie de la Mer*, tome 2, appen.; *Pistoye et Duverdy, et Traité des Prises*, tome 2, appen.; *De Cussy, Droit Maritime* liv. 2, ch. 28.)

§ 17. Debts contracted before the declaration of war, and owing by one belligerent, or its allies, to the enemy, are necessarily merged in the war, and must abide the issue of the contest, or rather the stipulations of the treaty of peace by

which it is terminated. Formerly debts contracted in time of peace, and owing by the belligerent state, or its subjects, to the subjects of the enemy, were also regarded as annulled or confiscated by the declaration of war. This doctrine is fully recognized in the writings of Cicero, Grotius, Puffendorf, Bynkershoek, and others. But, according to Vattel, the rigor of this rule was afterwards relaxed, and the opposite custom grew up in its place, which has now become so general throughout Europe, that the sovereign who should enforce the former rule, would be regarded as violating good faith; for strangers trusted his government or subjects only from the firm persuasion that the modern custom would be observed. Emerigon and Martens advocate the same doctrine. The question is also most ably discussed by Hamilton in the numbers of *Camillus*, published in 1795.

The supreme court of the United States has decided that the right, *stricti jure*, still exists as a settled and undoubted right of war recognized by the law of nations, although it was, at the same time, admitted to be the universal practice at present to forbear to seize and confiscate debts and credits, as also to seize and confiscate enemy's tangible property found in the country at the opening of the war. The court would not confiscate without an act of the legislative power declaring its will that such property should be condemned. Mr. Justice Story dissented in a most able and learned opinion. Mr. Phillimore makes a distinction between debts due from the state, in its corporate capacity, to individuals,—money invested in the public funds and the like,—and private debts of individuals of the one state to individuals of the other. While admitting that private debts may be confiscated, *stricti jure*, although modern custom is opposed to the exercise of that right, he says that the opinion of Vattel, Emerigon and Martens, against the lawfulness of confiscating those due from the *state* to enemy's subjects, “now may happily be said to have no gainsayers.” Wildman says: “It will not be easy to find an instance where a prince has thought fit to make reprisals upon a debt due from himself to private men; there is a confidence that this will not be done. A private man lends money to a prince upon the faith of an engagement of honor, because he cannot be compelled,

like other men, in an adverse way in a court of justice. So scrupulously did England, France and Spain adhere to this public faith, that during war they suffered no inquiry to be made whether any part of the public debts was due to subjects of the enemy, though it is certain many English had money in the French funds, and many French had money in ours." With respect to the confiscation of private debts, the same author considers that the rigid rule of Grotius and Bynkershoek has been more or less mitigated by the wise and humane practice of modern times. "By the 34 *George 3, c. 79*," he says, "the transmission of money due to the enemy was prevented; the money itself was called in, secured, and kept for those to whom it was due, until the return of peace should enable them to receive it." (*Wildman, Int. Law*, vol. 2, pp. 10, 11; *Kent, Com. on Am. Law*, vol. 1, p. 62; *Wheaton, Elem. Int. Law*, pt. 4, ch. 1, § 12; *Cicero, de Off.*, lib. 3, cap. 26; *Grotius, de Jur. Bel. ac Pac.*, lib. 1, cap. 1, § 6; lib. 3, cap. 7, §§ 3, 4; *Puffendorff, de Jur. Nat. et Gent.*, lib. 8, caps. 6, 19, 20, 23; *Bynkershoek, Quaest. Jur. Pub.*, lib. 1, cap. 7; *Vattel, Droit des Gens*, liv. 3, ch. 5, § 77; *Hamilton, The Federalist*, Camillus, Nos. 18 to 23; *Brown v. The United States*, 8 *Cranch. Rep.*, p. 110; *Phillimore, on Int. Law*, vol. 3, § 87-89; *Manning, Law of Nations*, pp. 129-131; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 9.)

§ 18. After a full examination of the authorities and decisions on this question, Chancellor Kent says: "We may, therefore, law it down as a principle of public law, so far as the same is understood and declared by the highest judicial authorities in this country, that it rests in the discretion of the legislature of the union, by a special law for that purpose, to confiscate debts contracted by our citizens, and due to the enemy; but, as it is asserted by the same authority, this right is contrary to universal practice, and it may, therefore, well be considered as a naked and impolitic right, condemned by the enlightened conscience of modern times." On this question, Mr. Wheaton remarks: "In respect to debts due to an enemy, previously to the commencement of hostilities, the law of Great Britain pursues a policy of a more liberal, or at least, of a wiser character, than in respect to droits of admiralty. A maritime power, which has an overwhelming supe-

riority, may have an interest, or may suppose it has an interest, in asserting the right of confiscating enemy's property, seized before an actual declaration of war; but a nation which, by the extent of its capital, must generally be the creditor of every other commercial country, can certainly have no interest in confiscating debts due to an enemy, since that enemy might, in almost every instance, retaliate with much more injurious effect. Hence, though the prerogative of confiscating such debts, and compelling their payment to the crown, still theoretically exists, it is seldom or ever practically exerted. The right of the original creditor to sue for the recovery of the debt, is not extinguished; it is only suspended during the war, and revives in full force on the restoration of peace. Such, too, is the law and practice in the United States. The debts due by American citizens to British subjects, before the war of the revolution, and not actually confiscated, were judicially considered as revived, together with the right to sue for their recovery on the restoration of peace between the two countries." By the treaty of 1794, between the United States and Great Britain, it was stipulated that debts due from individuals of the one nation to individuals of the other, should never, in any event of war or national differences, be sequestered or confiscated. (*Kent, Com. on Am. Law*, vol. 1, p. 65: *Wheaton, Elem. Int. Law*, pt. 4, ch. 1, § 12; *Martens, Nouveau Recueil*, tome 2, p. 16; *Wolf v. Oxholm*, 6 *Maule and Selwyn's Rep.*, p. 92; *Brown v. The United States*, 8 *Cranch. Rep.*, p. 110; *The State of Georgia v. Brailsford, et al.*, 3 *Dallas Rep.*, pp. 4, 5; *ex parte Boussmaker*, 13 *Vesey Jur. Rep.*, p. 71; *The Neustra Signora de las Dolores, Edwards Rep.*, p. 60; *Furtade v. Rodgers*, 3 *Bos. and Puller Rep.*, p. 191; *Ware v. Hilton et al.*, 3 *Dallas Rep.*, pp. 199–285.)

§ 19. While the English text-writers and jurists have contended for the right to seize and sequester the property of an alien enemy found in British territory, at the declaration of a war, as a right conceded by the law of nations, they have almost uniformly denied the right to confiscate debts due to such enemy, on the ground that usage and custom have annulled that right. The distinction thus attempted to be drawn between debts and other property is not well founded in reason or authority, but has resulted, apparently,

from policy and interest. Mr. Wheaton gives several examples of the forced application of this doctrine. "On the commencement," he says, "of hostilities between France and Great Britain, in 1793, the former power sequestered the debts and other property belonging to the subjects of her enemy, which decree was retaliated by a countervailing measure on the part of the British government. By the additional articles to the treaty of peace between the two powers, concluded at Paris in April, 1814, the sequestrations were removed on both sides, and commissaries were appointed to liquidate the claims of British subjects for the value of their property unduly confiscated by the French authorities, and also for the total or partial loss of the debts due to them, or other property unduly retained under sequestration subsequent to 1792. The engagement, thus extorted from France, may be considered as a severe application of the rights of conquest to a fallen enemy, rather than a measure of even-handed justice, since it does not appear that French property, seized in the ports of Great Britain and at sea, in anticipation of hostilities, and subsequently condemned as *droits of admiralty*, were restored to the original owners under this treaty, on the return of peace between the two countries." (*Wheaton, Elem. Int. Law*, pt. 4, ch. 1, § 12; *Martens, Nouveau Recueil*, tome 2, p. 16; *De Cussy, Droit Maritime*, liv. 2, ch. 6.)

§ 20. The same author says: "On the rupture between Great Britain and Denmark in 1807, the Danish ships, and other property, which had been seized in the British ports, and on the high seas, before the actual declaration of hostilities, were condemned as *droits of admiralty* by the retrospective operation of the declaration. The Danish government issued an ordinance retaliating this seizure, by sequestering all debts due from Danish to British subjects, and causing them to be paid into the Danish royal treasury. The English court of king's bench determined that this ordinance was not a legal defense to a suit in England for such a debt, not being conformable to the usage of nations; the text-writers having condemned the practice, and no instance having occurred of the exercise of the right, except the ordinance in question, for upwards of a century. The soundness of

this judgment may well be questioned. It has been justly observed, that between debts contracted under the faith of laws, and property acquired on the faith of the same laws, reason draws no distinction; and the right of the sovereign to confiscate debts is precisely the same with the right to confiscate other property found within the country on the breaking out of the war. Both require some special act expressing the sovereign will, and both depend, not on any inflexible rule of international law, but on political considerations, by which the judgment of the sovereign may be guided." In another place, Mr. Wheaton said, in reference to this transaction, "It is difficult to show a reasonable distinction between debts contracted under the public faith in time of peace, and property found in the enemy's territory on the breaking out of the war, or taken at sea before the declaration of hostilities." The amount of Danish property condemned by the British government in 1807, as *droits of admiralty*, was computed at one million two hundred and sixty-five thousand pounds, while the debts due to British subjects, sequestered by Denmark, amounted to only from two hundred thousand pounds to three hundred thousand pounds. (*Wheaton, Elem. Int. Law*, pt. 4, ch. 1, § 12, note; *Wolf v. Oxholm*, 6 *Maule and Selwyn Rep.*, p. 92; *Brown v. United States*, 8 *Cranch. Rep.*, p. 110.)

§ 21. As remarked in a preceding paragraph, it is not, in all cases, easy to determine from what circumstances, and at what period, war shall be said to have commenced, so as to fix the character of a public enemy on the state with which it is waged. Where a public declaration or manifesto precedes hostilities, the war exists from the time it is declared. But such a precedent declaration is not, as has already been stated, necessary to legalize hostilities; and, by modern usage, it is sometimes dispensed with, and the war commenced without any public notice or warning. Not only reprisals, but acts of more positive aggression, under the sanction and authority of the government, sometimes precede the declaration of war, and are covered by its retroactive effect. Again, in other cases, no declaration or manifesto is ever issued, or, if issued at all, it merely recognizes the war, as that between the United States and Mexico, to be an exist-

ing fact. Where the government itself has fixed no positive time for the commencement of hostilities, either past or future, and where its intentions are at all doubtful, the conduct of individuals is entitled to a lenient and favorable construction. A court will not, in such cases, condemn property as involved in trade with the enemy, unless fully satisfied, not only that hostilities existed, but that the fact was so public and notorious that the knowledge of its existence was justly to be imputed to the parties by whom the acts of supposed illegality were committed or authorized. It would be plainly unjust to confiscate property, or annul contracts, where reasonable doubts exist, either as to the intentions of the government, or the knowledge of the parties. (*Wheaton, Elem. Int. Law*, pt. 4, ch. 1, § 8, *Grotius, de Jur. Bel. ac Pac.*, lib. 1, cap. 8, § 4; *Bynkershoek, Quaest. Jur. Pub.*, lib. 1, cap. 2; *Rutherford, Institutes*, b. 2, ch. 9, § 10; *Vattel, Droit des Gens*, liv. 3, ch. 4, §§ 51-56; *Klüber, Droit des Gens Mod.*, §§ 238, 239; *Duer, On Insurance*, vol. 1, p. 592; *London Law Magazine*, vol. 18, p. 92; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 9.)

§ 22. The same leniency is certainly due to neutrals in such cases. Where there has been no official declaration of war, and no notification by manifesto of its actual existence, the conduct of neutrals is entitled to the most favorable construction, and neutral property cannot be condemned, for violation of neutral duty, without proof that the war *de facto* was so public and notorious that the neutral could not have been in ignorance of its existence. But where such knowledge is actually brought home to him, it seems to us to place him in the same position, with respect to the character of his acts, as if an official declaration or manifesto had been issued. *Hautefeuille*, however, thinks the declaration or manifesto absolutely essential to bind neutrals. Even in the case of defensive war, supposed by *Vattel*, where the party attached is required to repel hostilities, belligerent rights accrue as against the enemy only, but not with respect to neutrals. So far as they are concerned, such hostilities are to be regarded precisely as if they did not exist. But this view is not supported either by reason or usage. (*Hautefeuille, Des Nations Neutres*, tit. 3, ch. 1; *Rayneval, De la Liberté des Mers*, tome 2, pp. 284, et seq.; *Ortolan, Dip. de la Mer*, liv.

3, ch. 1; *Vattel, Droit des Gens*, liv. 3, ch. 4, § 51; *Martens, Nouvelles Causes Cel.*, tome 1, pp. 56, et seq.; *Rayneval, Inst. du Droit de la Nat.*, etc., liv. 3, ch. 3, § 1.)

§ 23. A declaration of war does not *ipso facto* extinguish treaties between the belligerent states. Treaties of friendship and alliance are necessarily annulled by a war between the contracting parties, except such stipulations as are made expressly with a view to a rupture, such as limitations of the general rights of war, etc. So of treaties of commerce and navigation; they are generally either suspended or entirely extinguished by a war between the parties to such treaties. All stipulations, with respect to the conduct of the war, or with respect to the effect of hostilities upon the rights and property of the citizens and subjects of the parties, are not impaired by supervening hostilities, this being the very contingency intended to be provided for, but continue in full force until mutually agreed to be rescinded. There are many stipulations of treaties, which, although perpetual in their character, are suspended by a declaration of war, and can only be carried into effect on the return of peace. But this subject will be further noticed in another chapter. (*Vattel, Droit de Gens*, liv. 3, ch. 10, § 175; *Wheaton, Elem. Int. Law*, pt. 3, ch. 2, § 10; *Kent, Com. on Am. Law*, vol. 1, p. 175.)

§ 24. We have thus far mostly confined our remarks to the effects of a declaration of war upon belligerent states and their subjects in their international relations. Its effects upon the relations of the citizens of a belligerent state with their own government belong to constitutional or municipal law, rather than to general public law; nevertheless, as there are certain general principles which govern these relations in all countries and under all governments, it may be proper to allude to them in this place. For example, any place, port, town, fortress, or section of country occupied by the enemy, is, for most purposes, regarded in law as *hostile territory*, so long as such occupation is continued. If the place so occupied were previously neutral, or a part of our own territory, it is no longer regarded as such, for it would be absurd to suppose that persons who are hostile themselves, or who are under a hostile authority, are to exercise the same civil rights as neutrals or citizens in time of peace.



The relations of the government to a place or territory so occupied or situated, are of a military character, and consequently are not regulated by the civil laws, which are made for the condition of peace. This change of relation, or rule of government, does not result from anything in the particular constitution or laws, but from the *fact* of the existence of war and the hostile occupation of the place. The same rule applies to a place, or district of country, which is invaded or besieged by an enemy; the *fact* of the invasion or beleaguering is, in itself, a substitution of military for civil authority; the absence of peace suspends the law of peace, and the presence of war substitutes military rule. What is called a declaration of martial law in one's own country, is the mere announcement of a fact; it does not, and cannot create that fact. The exigencies which, in any particular place, justify the taking of human life without the interposition of the civil tribunals, and without the authority of the civil law, may justify the suspension of the power of such tribunals and the substitution of martial law. The law of war, or at least many of its rules, are merely the results of a paramount necessity. On this point we quote the language of Attorney-General Cushing: "There may undoubtedly be, and have been, emergencies of necessity, capable of themselves to produce, and therefore to justify such suspension of all law, and involving, for the time, the omnipotence of military power. But such a necessity is not of the range of mere legal questions. When martial law is proclaimed, under circumstances of assumed necessity, the proclamation must be regarded as the statement of an existing fact, rather than the legal creation of that fact. In a beleaguered city, for instance, the state of seige lawfully exists, because the city is beleaguered, and the proclamation of martial law, in such case, is but notice and authentication of a fact,—that civil authority has been suspended, of itself, by the force of circumstances, and that, by the same force of circumstances, the military has had devolved upon it, without having authoritatively assumed, the supreme control of affairs in the care of the public safety and conservation. Such, it would seem, is the true explanation of the proclamation of martial law at New Orleans by General Jackson." The declaration, or exercise of martial

law in a foreign country, by the commander of an invading, occupying, or conquering army, is an element of the *jus belli*, and will be more particularly treated of in the chapters on the rights of military occupation and of complete conquest. (*Vide Post*, chapters xxxii and xxxiii; *Cushing, Opinions of, U. S. Att'ys Gen.*, vol. 8, pp. 365, et seq.; *Hansard, Parl. Deb., N. S.*, vol. 9; third series, vol. 115; *Gardner, Institutes of Am. Int. Law*, p. 208.)

§ 25. *Martial law* has often been confounded with *military law*, but the two are very different. Military law, with us, consists of the "rules and articles of war," and other statutory provisions for the government of military persons, to which may be added the unwritten or common law of the "usage and custom of military service." It exists equally in peace and in war, and is as fixed and definite in its provisions as the admiralty, ecclesiastical, or any other branch of law, and is equally, with them, a part of the general law of the land. But, in the words of Chancellor Kent, "martial law is quite a distinct thing." It exists only in a time of war, and originates in military necessity. It derives no authority from the civil law, (using the term in its mere general sense,) nor assistance from the civil tribunals, for it overrules, suspends and replaces both. It is from its very nature, an arbitrary power, and "extends to all the inhabitants (whether civil or military) of the district where it is in force." It has been used in all countries and by all governments, and it is as necessary to the sovereignty of a state as the power to declare and make war. The right to declare, apply and enforce martial law, is one of the sovereign powers, and resides in the governing authority of the state, and it depends upon the constitution of the state whether restrictions and rules are to be adopted for its application, or whether it is to be exercised according to the exigencies which call it into existence. But even when left unrestricted by constitutional or statutory law, like the power of a civil court to punish contempts, it must be exercised with due moderation and justice; and, as "paramount necessity" alone can call it into existence, so must its exercise be limited to such times and places as this necessity may require; and, moreover, it must be governed by the rules of general public law, as applied to a state of war. It, therefore, cannot be

despotically or arbitrarily exercised, any more than any other belligerent right can be so exercised. (*Cushing, Opinions of U. S. Att'ys. Genl.*, vol. 8, pp. 365, et seq.; *Wolfius. Jus Gentium*, § 868; *Grotius, De Jur. Bel. ac Pac.*, lib. 2, cap. 8; *Kluber, Droit des Gens*, § 255; *O'Brien, American Military Law*, p. 28.)

§ 26. The laws of different countries, with respect to the application and exercise of this power, are very different. In the jurisprudence of France, for example, three conditions of things are carefully defined and provided for: 1st, *The state of peace*, where all persons are governed by the civil or military authority, according to the class to which they belong, and the law applicable to the particular case; 2d, *The state of war*, where the law and authority governing depends upon the particular condition of the place and circumstances of the case, the civil authority sometimes acting in concert with, and sometimes in subordination to the military; and 3d, *The state of seige*, where the civil law is suspended for the time being, or, at least, is made subordinate to the military, and the place is put under martial law, or under the authority of the military power. This may result from the presence of a foreign enemy, or by reason of a domestic insurrection, and the rule applies to a district of country as well as to a fortress or city. A similar system is adopted in Spain, and in most of the countries of continental Europe. "The state of seige of the continental jurists," says Cushing, "is the proclamation of martial law of England and the United States, only we are without law on the subject, while in other countries it is regulated by known limitations." The English common law authorities, and commentators, generally confound *martial* with *military* law, and, consequently, throw very little light upon the subject considered as a domestic fact, and, in parliamentary debates, it has usually been discussed as a *fact*, rather than as forming any part of their system of jurisprudence. Nevertheless, there are numerous instances in which martial law has been declared and enforced in time of rebellion or insurrection, not only in India and British colonial possessions, but also in England and Ireland. It seems that no act of parliament is required to precede such declaration, although

it is usually followed by an act of indemnity, when the disturbances which called it forth are at and end, in order to give constitutional existence to the *fact* of martial law. (*Block, Dic. de l'Admin. Française*, passim.; *Escriche, Dic. de Leg. y Jurisprudencia*, passim.; *Cushing, Opinions of U. S. Att'ys Genl.*, vol. 8, pp. 366, et seq.; *Hale, Hist. Com. Law*, p. 89; *Stephen, Commentaries*, vol. 2, p. 602; *Hansard, Parl. Deb., N. S.*, vol. 11; third series, vol. 115; *Grant v. Gould*, 2 *H. Blackstone, Rep.*, p. 98; *Blackstone, Commentaries*, vol. 1, p. 136; *Bowyer, Universal Pub. Law*, p. 424.)

§ 27. Martial law is not mentioned by name in the constitution or statutes of the United States, nor is there much light thrown upon the subject by the constitutions and laws of the several states of the union, or the decisions of our courts. It is true that the constitution recognizes the *fact* that there may be cases of rebellion and invasion, but it has made no general provision for the supposable or necessary incidents to such a condition of affairs. The only clause having direct relevancy to this subject, is the declaration that "the privilege of the writ of *habeas corpus* shall not be suspended, unless when, in case of rebellion or invasion the public safety may require it." Now, the suspension of the writ of *habeas corpus* is not, in itself, a declaration of martial law; it is simply an incident, although a very important incident to such declaration. In other words, the incident is constitutionally provided for, while the substance, or general principle, is merely recognized, but in no other manner alluded to. Probably the framers of that instrument saw the difficulty of attempting to regulate, by any fixed rules, that which results from paramount necessity alone, and which, from its very nature, is scarcely susceptible of minute regulation. Practically, in England and the United States, the essence of martial law, is the suspension of the privilege of the writ of *habeas corpus*, — that is, the withdrawal of a particular person, or of a particular place or district of country from the authority of the civil tribunals. A mere declaration of martial law, no matter how much, "in case of rebellion or invasion, the public necessity may require it," would be utterly useless unless accompanied by a suspension of the privilege of the writ of *habeas corpus*; for if the local civil

authorities were permitted, in such a case, to enforce this writ, they might, and some probably would, render the military powerless to provide for "the public safety." Hence, in the United States, the two, — martial law and the suspension of the writ, — although differing as the whole differs from a part, have been practically regarded as one and the same thing. The clause of the federal constitution which restricts the suspension of this writ to cases where "the public safety may require it," is contained in the first article of that instrument, and hence, it has been inferred by some, that inasmuch as that article relates principally to the powers of congress, it was intended that congress alone should have power to suspend this writ. But this negation of power is general in its terms, and is found in the section of things denied, not only to congress, but to all other branches of the federal government, and to all the states. It is not a delegation of power, but a limitation, — a negative rather than a positive enunciation, — of a power, the previous existence of which is recognized; and this negative reaches all the functionaries, legislative and executive, civil and military, not only of the federal government, but also of the state governments; that is to say, there can be no valid suspension of the writ of *habeas corpus*, "unless when, in case of rebellion, or invasion, the public welfare may require it." There must be two coëxisting facts, in order to make it valid; 1st, The fact of "rebellion or invasion;" and 2d, The fact that "the public safety requires it." It is very evident, from their nature, that both of these facts may occur when congress is not in session, or, if in session, may occur in some remote part of the country—say in Oregon or California—where its action could not reach till long after the public exigencies had passed. In such a case how is "the public safety" to be provided for, if congress alone can suspend this writ? Again, these two facts may occur in a state where there is a rebellion against the state government, but not against any authority of the United States; may not the state government, in accordance with its own constitution, suspend this writ? It is so held. But, if it be true that the federal constitution confines this power to congress alone, how can it be exercised by a state? And if by a state, why not by the

executive of the United States? "The executive power" of the government is vested in the President, and he is the "commander in chief of the army and navy of the United States, and of the militia of the several states when called into the actual service of the United States," and it is his duty to resist an "invasion," and to suppress an "insurrection;" it would, therefore, seem to properly devolve upon him, and upon those acting under his authority for the accomplishment of these objects, to enforce martial law, or to suspend the writ of *habeas corpus*, "in case the public safety may require it." If the previous action of congress be necessary, in each particular case, to render such suspension valid, it is evident that there can scarcely ever be a valid suspension of this writ, for "the public necessity" will almost always have passed before any legislative action can be had in the premises. It would, therefore, seem more consonant with the principles of legal interpretation, and with the nature of the case, to regard this clause in the constitution as a limitation of a general power existing in *the government*, rather than as conferring or delegating that power to any particular branch or functionary of that government, and, consequently, that this power does not belong *exclusively* to congress, but may also be exercised by the executive, subject always to his liability to impeachment by congress.

It must be admitted, however, that commentators on the constitution have expressed the opinion that this power is vested in congress alone; but they seem to have assumed this construction, rather than to have fully considered and discussed the question in all its bearings. There has not been, so far as we are aware, any authoritative decision of the supreme court of the United States on the subject, for the question was not raised in *ex parte Bolman and Swartout*, (4 *Cranch. R.*, p. 101;) but the inferior courts have generally held that the direct action of the legislative power is necessary in all cases to authorise the suspension, and that, without this essential prerequisite, they would enforce the writ in all places, against all persons, and under all circumstances whatsoever. It should be remarked, however, that some of these opinions have been given in cases of conflict between the courts and the executive or military authorities, where pas-

sions were excited, and where the judges appeared more anxious to exercise their own prerogatives than to preserve and sustain the government of their country. Judicial opinions, given under such circumstances, are entitled to very little weight. The judges who rendered these decisions seem to have overlooked the fact that *war*, resulting from rebellion or invasion, is, from its very nature, a substitution of military for civil authority. That the latter authorities do not, and can not, perform their ordinary functions, is to be presumed from the fact that war exists, for if the courts could enforce the laws there would be no occasion for the action of the military power—there could be, constitutionally and legally, no *war*. Moreover, when a military force is called out to repel an “invasion,” or to suppress a “rebellion,” it is not placed under the direction of the judiciary, but under that of the executive. Suppose the military force, legally and constitutionally called into service for the purposes indicated, should find it necessary, in the course of its military operations, to occupy a field or garden, or to destroy trees or houses, belonging to some private person, can a court, by injunction, restrain them from committing such waste? It can do so in time of peace, and, if its powers are to continue in time of war, the judiciary, and not the executive, will command the army and navy. The taking or destroying of private property in such cases is a military act—an act of war, and must be governed by the laws of war; it is not provided for by the laws of peace. In the same way, a person taken and held by the military forces, whether before, or in, or after a battle, or without any battle at all, is virtually a *prisoner of war*. No matter what his alleged offense, whether he is a rebel, a traitor, a spy, or an enemy in arms, he is to be held and punished according to the *laws of war*, for these have been substituted for the laws of peace. And for a person so taken and held by the military authority, a writ of *habeas corpus* can have no effect, because, in the words of the U. S. supreme court, “the ordinary course of justice would be utterly unfit for such a crisis.” But this view has been objected to on the ground that it allows too much power to the executive. This objection is answered by the court in the same case, as follows: “It is said that this power in the President is

dangerous to liberty, and may be abused. All power may be abused if placed in unworthy hands. But it would be difficult, we think, to point out any other hands in which this power would be more safe, and at the same time equally effectual." (*Luther v. Borden*, 7 *Howard Rep.*, p. 1; *Martin v. Mott*, 12 *Wheaton Rep.*, p. 19; *Story, Com. on the Constitution*, § 1842; *Tucker's Blackstone*, vol. 1, p. 292; *Johnson v. Duncan*, et al., 3 *Martin Rep.*, O. S., p. 580.)

§ 28. Congress has never acted under this clause of the constitution, either to suspend the writ of *habeas corpus*, to authorize the suspension, or to approve or condemn the conduct of those who have suspended it. There, however, have been a number of occasions on which it has been suspended by the executive and military authorities of the United States. During the administration of President Washington, in the Pennsylvania "Whisky Insurrection" of 1794 and 1795, the military authorities engaged in suppressing it disregarded the writs which were issued by the courts for the release of the prisoners who had been captured as insurgents. General Wilkinson, under the authority of President Jefferson, during the Burr conspiracy of 1806, suspended the privilege of this writ, as against the superior court of New Orleans. General Jackson assumed the right to refuse obedience to the writ of *habeas corpus*, first in New Orleans, in 1814, as against the authority of Judge Hall, when the British army was approaching that city; and afterward in Florida, as against the authority of Judge Fromentin. The case of General Wilkinson was brought directly to the notice of Congress, but as that body refused either to approve or to disapprove his conduct, it has been claimed that this non-action of the national legislature was a tacit acquiescence in the power of the President to authorize the suspension of this writ, "when in case of rebellion, or invasion, the public necessity may require it." (*Parton, Life of Jackson*; *Hamilton, Hist. of the Republic*, vol. 6; *Wilkinson, Memoirs*; *Cushing, Opinions of U. S. Att'y. Gen'l.*, vol. 8, p. 374.)

§ 29. But suppose it should be definitively decided that congress alone is empowered to suspend the privilege of this writ, and cases of "rebellion or invasion" should occur, where an imperious overruling public necessity required, from the



President, or those under his authority, an exercise of this power, must he disregard "the public safety," and permit a judge, who is armed with this writ, to endanger or destroy the government? Even if it were plain that the words of the constitution were intended to give this power *exclusively* to congress, we think that in a case of public danger, at once so imminent and grave as to admit of no other remedy, the maxim *salus populi suprema lex* should form the rule of action, and that a suspension of this writ, by the executive and military authorities of the United States, would be justified by the pressure of a visible public necessity; if an act of indemnity were required, it would be the duty of congress to pass it. But if the President should exercise, or should authorize others to exercise this power improperly, or unnecessarily, he would be liable to impeachment. (*Cushing, Opinions of U. S. Att'ys. Gen.*, vol. 8, pp. 365, et seq.)

§ 30. We remark, in conclusion, that the right to declare, apply and exercise martial law, is one of the rights of sovereignty, and is as essential to the existence of a state as is the right to declare or carry on war. It is one of the incidents of war, and, like the power to take human life in battle, results directly and immediately from the fact that war legally exists. It is a power inherent in every government, and must be regarded and recognized by all other governments; but the question of the authority of any particular functionary to exercise this power is a matter to be determined by local and not by international law. Like a declaration of a siege or blockade, the power of the officer who makes it is to be presumed until disavowed, and neutrals, who attempt to act in derogation of that authority, do so at their peril. (*Vide Post*, chap. xxiii; *Cushing, Opinions of U. S. Att'y. Gen.*, vol. 8, pp. 365, et seq.)

## CHAPTER XVI.

### MEANS AND INSTRUMENTS FOR CARRYING ON WAR.

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§ 1. As a general rule, every citizen is bound to serve and defend the state of which he is a member, as far as he is capable. This concurrence, for the common defense and general security, is one of the principal objects of every political association, and without this society could not be maintained. When, therefore, a state has declared war, every citizen is bound to assist in carrying it to a successful conclusion, whatever may be his individual opinion of the necessity or propriety of the resort to arms by his own government.

Even though he may not deem the objects of the war justifiable, or its motives commendable, he is, nevertheless, bound to stand by the state in the prosecution of that war. This, however, will not prevent his directing his best efforts and influence to bring about a just and satisfactory settlement of the causes of the war. If he thinks that his own government has entered into the contest rashly and inconsiderately, he may seek to convince it of its error, and to induce a withdrawal or modification of its pretensions, and a concession of some of the enemy's demands; but, however justifiable and proper his efforts to restore peace, till this is effected the state is entitled to his services in carrying on the war. (*Vattel, Droit des Gens.*, liv. 3, ch. 2, § 8; *Burlamaqui, Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 1; *Phillimore on Int. Law*, vol. 3, §§ 70, 71.; *Wildman, Int. Law*, vol. 2, § 8; *Polson, Law of Nations*, sec. 6; *De Felice, Droit de la Nature, etc.*, tome 2, lec. 20.)

§ 2. Although every man, capable of bearing arms, is bound to take them up if required, in the service of the state, this duty is limited and regulated by municipal law. At present most nations maintain regular military and naval forces, which are increased in time of war by volunteers, militia, or new levies. Moreover, the soldiers and sailors required for carrying on military operations are generally enlisted without compulsion, which greatly mitigates the evils of war. Even where levies are made to fill up the ranks of the army, or to supply the navy, the great body of the people are left to pursue their ordinary peaceful avocations. Occasionally, however, the public authorities of particular places call out all citizens capable of carrying arms; but even then there are certain classes exempt from military duty. Old men, women and children are, in general, unfit for the occupation of war, being incapable of handling arms, or of supporting the fatigues of military service. Magistrates, and other civil officers, are exempted, their time being occupied in the administration of justice and the maintenance of order. The clergy are also usually exempted from military service, the duties of their profession being deemed incompatible with those of war. All these classes, which, by general usage, or the municipal laws of the belligerent state, are exempt from military

duty, are not subject to the general rights of a belligerent over the enemy's person. To these are added, by modern usage, all persons who are not organized or called into military service, though capable of its duties, but who are left to pursue their usual pacific avocations. All these are regarded as *non-combatants*. (*Bello, Derecho Internacional*, pt. 2, cap. 8, § 4; *Vattel, Droit des Gens*, liv. 3, ch. 2, §§ 9, 10; *Burlamaqui, Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 1.; *Phillimore, On Int. Law*, vol. 3, § 70.; *De Felice, Droit de la Nature, etc.*, tome 2, lec. 20.; *Polson, Law of Nations*, sec. 6.)

§ 3. Nevertheless, it often happens, in case of invasions, and in the siege of fortified towns, that not only merchants, mechanics, and the common peasantry, but also the clergy, magistrates, old men, women, and even children, take up arms and render good service in the common defense. In doing this they lose the character of *non-combatants*, and become subject to the ordinary rules of war. Those who lay aside their peaceful avocations and engage, either directly or indirectly, in hostile acts toward the enemy, whether by the orders of their government, or their own free will, are liable to the consequences which lawfully result from such acts, but to none others. (*Vattel, Droit des Gens*, liv. 3, ch 2, § 10; ch 8, § 145; *Burlamaqui, Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 1; *Phillimore, On Int. Law*, vol. 3, § 94; *De Felice, Droit de la Nat., etc.*, tome 2, lec. 25; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 10; *Real, Science du Gouvernement*, tome 5, ch. 2, sec. 6, § 8.)

§ 4. "As war cannot be carried on without soldiers," says Vattel, "it is evident that whoever has the right of making war, has also naturally that of raising troops." This is true with respect to the state in its sovereign capacity, but not with respect to the particular departments into which the government of the state is divided. The constitution must determine to what department these powers shall belong, and whether they shall be combined or separate. In most European countries they both belong to the sovereign, and are regarded as prerogatives of majesty. In England the sovereign declares war, but he cannot compel persons to enlist, nor can he, in fact, keep an army on foot without the concurrence of parliament. In the United States, congress alone can declare

war, or authorize the raising of troops. The general right of the state to raise troops is a part of the *jus eminens*, or superior right, which the entire body may, for the common good, exercise over the individual members of which it is composed. (*Vattel, Droit des Gens*, liv. 3, ch. 2, § 7; *Grotius, de Jur. Bel. ac Pac.*, lib. 1, cap. 1, § 6; *Burlamaqui, Prin. du Politique*, pt. 4, cap. 1, § 12; *Kent, Com. on Am. Law*, vol. 1, p. 262; *Story, On the Constitution*, § 950; *Bowyer, Universal Public Law*, ch. 20.)

§ 5. If every citizen, as among the Romans, took his turn in serving in the army, such service would naturally be gratuitous. But where only a portion are called into military service, while the others are left to pursue their ordinary avocations, it is right and proper that those who bear arms should be paid by those who do not, for no individual is bound to do more than his proportion for the service and defense of the State. The duty of the state to support its troops is evident, and its right to levy taxes for this purpose results from its general sovereign power over property within its territory, when necessity or the public good requires. It is a part of the *jus eminens*, which, when it regards property, is called by writers on public law *dominium eminens*. This right has, by some, been placed on the ground of an implied consent of individuals to part with a portion of their property for the public good, while others regard it as arising from the obligations of natural equity, the obligation to contribute to the support of the government being similar to other obligations of secondary natural law, resulting as consequences from the institution of civil society. (*Grotius, de Jur. Bel. ac. Pac.*, lib. 1, cap. 1, § 6; *Vattel, Droit des Gens*, liv. 1, ch. 20, § 244; liv. 3, ch. 2, § 11; *Zallinger, Inst. Jur. Nat. et Pub.*, tome 1, liv. 3, c. 4, § 214; *Domat, Droit Pub.* liv. 1, tit. 5; *Bowyer, Universal Pub. Law*, ch. 20.)

§ 6. The rights and duties of a state, with respect to the support of its soldiers, are not limited to the time of their actual service in bearing arms; the provisions made for their support in old age, or when disabled by toil, sickness, or wounds—such as pensions, asylums, hospitals, etc.—are, therefore, regarded as constituting a part of their military pay; and the extent of these provisions generally determines

the character of the state, and of its citizens, for humanity, generosity, and good government. A country which does not properly support and pay those who bear arms in its service, will soon find itself without the means of defense, and a government which leaves those who have wasted their strength, and shed their blood in its service, to beg their bread or perish with want, deserves, as it will always receive, the contempt of every noble and generous heart. Moreover, if the state neglect to provide for its troops regularly and systematically, they will provide for themselves by pillage, robbery and massacres while in the field, and by a subversion of the civil government on the return of peace. It is only, with respect to their conduct in war, that the provisions made by a state for the support of its troops become matters of serious international interest. The horrible atrocities committed by the unpaid troops of the middle ages, form the most bloody pages in the annals of history. (*Hallam, Middle Ages*, ch. 2; *Manning, Law of Nations*, p. 171; *Vattel, Droit des Gens*, liv. 3, ch. 2, §§ 11, 12; *Ward, Law of Nations*, vol. 1, pp. 265, et seq.)

§ 7. Foreigners, who voluntarily serve a state for stipulated pay, are called *mercenaries*. The right of citizens of one state to be so employed by another, and of this other to so employ them, has often been discussed by publicists. That any citizen, with the consent of his own state, may serve another, cannot be denied. But, in doing this, he changes his nationality, and must thereafter look for support and protection to the state in whose service he is engaged. The right of a state, to permit its citizens to be employed in the military service of another, is very questionable, but the right of this other to so employ them, (with such permission,) cannot be doubted. The *policy* of doing so, is a very different question. Mercenaries enlist voluntarily, for no state has a right to require such service of undomiciled foreigners. Domiciled foreigners may be required to do duty in the militia, or the civic and national guards, for the preservation of order and the enforcement of the laws, within a reasonable distance of their place of domicil. But such duty is rather of a civil than a military character. It does not include service against a foreign enemy, nor general military service in a civil war.

(*Bynkershoek, Quaest. Jur. Pub.*, lib. 1, cap. 22; *Bello, Derecho Internacional*, pt. 2, cap. 1, § 5; *Ward, Law of Nations*, vol. 2, p. 301; *Vattel, Droit des Gens*, liv. 3, ch. 2, §§ 13, 14; *Manning, Law of Nations*, pp. 172-181; *Heffter, Droit International*, § 62.)

§ 8. Partizan and guerrilla troops, are bands of men self-organized and self-controlled, who carry on war against the public enemy, without being under the direct authority of the state. They have no commissions or enlistments, nor are they enrolled as any part of the military force of the state; and the state is, therefore, only indirectly responsible for their acts. As a general rule, it will neither recognize their acts nor attempt to save them from the punishment due for their violations of the laws of war. At most, the government only winks at their crimes, while it profits by their depredations upon the enemy. Questions have sometimes arisen, whether a state can properly make use of such forces, and whether, when taken by the other belligerent, they are to be treated as ordinary prisoners of war. The answer to the first question is obvious. If authorized and employed by the state, they become a portion of its troops, and the state is as much responsible for their acts, as for the acts of any other part of its army. They are no longer partizans and guerrilleros, in the proper sense of those terms, for they are no longer self-controlled, but carry on hostilities under the direction and authority of the state. The solution to the second question may not be quite so obvious. It will, however, readily be admitted, that the hostile acts of individuals, or of bands of men, without the authority or sanction of their own government, are not legitimate acts of war, and, therefore, are punishable according to the nature or character of the offense committed. The taking of property by such forces, in offensive hostilities, is not a belligerent act authorized by the law of nations, but a *robbery*. So, also, the killing of an enemy by such forces, except in self-defense, is not an act of war, but a *murder*. The perpetrators of such acts, under such circumstances, are not enemies, legitimately in arms, who can plead the laws of war in their justification, but they are robbers and murderers, and, as such, may be punished. Their acts are unlawful; and, when captured, they are not treated

as prisoners of war, but as criminals, subject to the punishment due to their crimes. Hence, in modern warfare, partizans and guerrilla bands, such as we have here described, are regarded as outlaws, and, when captured, may be punished the same as free-booters and banditti. As examples, we refer to the conduct and punishment of the guerrilla bands, in Spain, during the Peninsular war, and by Gen. Scott, in Mexico, during the war between that republic and the United States. (*Cicero, de Officiis*, lib. 1, c. 11; *Kent, Com. on Am. Law*, vol. 1, p. 94; *Bynkershoek, Quaest. Jur. Pub.*, lib. 1, cap. 26; *Vattel, Droit des Gens*, liv. 3, ch. 15, § 226; *Martens, Précis du Droit des Gens*, § 264; *Heffter, Droit International*, § 126; *Phillimore, On Int. Law*, vol. 3, § 96; *Manning, Law of Nations*, p. 153; *Klüber, Droit des Gens*, § 267; *Hautefeuille, Des Nations Neutres*, tit. 3, ch. 2; *Scott, General Orders*, No. 372, Dec. 12th, 1847.)

§ 9. Some have attempted to apply this rule to the insurgent inhabitants who, under the authority of the state, rise *en masse* and take arms to repel an invasion. The distinction between the two cases is too manifest to require an extended discussion. In the kind of guerrilla warfare before spoken of, the individuals composing the bands acknowledge no authority but that of their own chiefs. They derive no authority from the state, and the state is no more responsible for their acts than for the unauthorized acts of any other subjects. But, in the case of a levy *en masse*, the inhabitants are organized and armed under the direction of the public authorities, and the state is directly responsible for their acts. In guerrilla warfare the individual alone is responsible for his acts, but where the mass of the people of a city or district bear arms under the direction of the government, they have become a legitimate part of the army, and the whole state is chargeable with any breach of the laws of war which they may commit. Any non-combatant may become a combatant without incurring any other penalty than that of being made subject to the laws applicable to active belligerents. If captured, they are entitled to the treatment of ordinary prisoners of war. The law of nations has, not unfrequently, been violated in European wars by disregarding the distinction which we have here pointed out between the unauthorized acts of self-consti-



tuted guerrilla bands, and the authorized acts of *levies en masse*, organized and armed under the authority of the state. The French generals, in the Peninsular war, often punished alike all Spanish peasants found in arms, whether or not under the authority and direction of their own government. And, in the invasion of France in 1814, the allies punished with death the armed French peasants, although they had been levied and forced to bear arms by the local authorities, under the proclamations of the emperor. The proper distinction was made by Wellington, in his invasion of the south of France, in 1814. The troops of Mina and Morillo, committed the greatest excesses in plundering the French peasants. This conduct was severely rebuked by Wellington. "A sullen obedience followed," says Napier, "for the moment, but the plundering system was soon resumed, and this, with the mischief already done, was sufficient to rouse the inhabitants of Bidasarray, as well as those of the Val de Baigorri, into action. They commenced and continued a partizan warfare until Lord Wellington, incensed by their activity, issued a proclamation calling upon them to *take arms openly and join Soult, or stay peaceably at home, declaring that he would otherwise burn their villages and hang all the inhabitants.* Thus it appeared that, notwithstanding all the outcries made against the French for resorting to this system of repressing the warfare of peasants in Spain, it was considered by the English general both justifiable and necessary. However, the threat was sufficient for the occasion." (*Napier, Hist. Peninsular War*, b. 23, ch. 3; *Alison, Hist. of Europe*, ch. 74, vol. 4, p. 329; *Manning Law of Nations*, p. 158.)

§10. A distinction is sometimes drawn between hostilities of private subjects on land and on the high seas, but it does not seem to rest upon a substantial foundation, or to be supported by satisfactory reasons. The case is fully presented in the following extracts from the commentaries of Chancellor Kent: "Although a state of war," he says, "puts all the subjects of one nation in a state of hostility with those of the other, yet, by the customary law of Europe, every individual is not allowed to fall upon the enemy. If subjects confine themselves to simple defense, they are to be considered as acting under the presumed order of the state,

and are entitled to be treated by the adversary as lawful enemies; and the captures which they make, in such a case, are allowed to be lawful prize. But they cannot engage in offensive hostilities, without the express permission of their sovereign; and if they have not a regular commission, as evidence of that consent, they run the hazard of being treated by the enemy as lawless banditti, not entitled to the mitigated rules of modern warfare." But, in speaking of the hostilities of private subjects on the high seas, he says: "Vessels are now fitted out and equipped by private adventurers, at their own expense, to cruise against the commerce of the enemy. They are duly commissioned, and it is said not to be lawful to cruise without a regular commission. Sir Mathew Hale, held it to be a depredation in a subject to attack the enemy's vessel, except in his own defense, without a commission. The subject has been repeatedly discussed in the supreme court of the United States, and the doctrine of the law of nations is considered to be, that private citizens cannot acquire a title to hostile property, unless seized under a commission, but they may still lawfully seize hostile property in their own defense. If they depredate upon the enemy without a commission, they act upon their peril, and are liable to be punished by their own sovereign; but the enemy is not warranted to consider them as criminals, and, as respects the enemy, they violate no rights by capture. Such hostilities, without a commission, are, however, contrary to usage, and exceedingly irregular and dangerous, and they would probably expose the party to the unchecked severity of the enemy; but they are not acts of piracy, unless committed in time of peace. Vattel, indeed, says, that private ships of war, without a regular commission, are not entitled to be treated like captives made in a formal war. The observation is rather loose, and the weight of authority undoubtedly is, that non-commissioned vessels of a belligerent nation may at all times capture hostile ships, without being deemed, by the law of nations, pirates. They are lawful combatants, but they have no interest in the prizes they may take, and the property will remain subject to condemnation in favor of the government of the captor, as *droits of the admiralty*. It is said, however, that, in the United States,

the property is not strictly and technically condemned upon that principle, but *jure reipublicae*; and it is the settled law of the United States, that all captures by non-commissioned captors are made for the government." It certainly is not easy to reconcile the language used in the different parts of these extracts. If private individuals, who engage in offensive hostilities on land, without a regular commission, "are not entitled to the mitigated rules of modern warfare," but are liable to be "treated by the enemy as lawless banditti;" if such hostilities on the high seas are "exceedingly irregular and dangerous," and "expose the party to the unchecked severity of the enemy," it is difficult to understand why "the enemy is not warranted to consider them as criminals," and why such parties "violate no rights of capture," "as respects the enemy." If private individuals, by offensive hostilities on the high seas, without commission or authority, violate no rights as against the enemy, certainly that enemy cannot treat them with "unchecked severity." The distinction here drawn by Kent, is not founded in reason, nor is it well supported by authority. It is true that Mr. Wheaton, and some other modern writers, express similar views, but we know of no English or American decision which sustains them. The cases to which they refer consider the lawfulness of such captures with respect to the government of the captors, but not with respect to the right of the opposing belligerent to punish the act as against him. The doctrine is sustained in the dissenting opinion of Mr. Justice Story in *The Nereide*, but it was neither involved in the case nor decided by the court. The continental publicists generally do not admit the distinction attempted to be drawn by Kent. Hautefeuille says: "It is admitted by all nations that, in maritime wars, every individual who commits acts of hostility, without having received a regular commission from his sovereign, however regularly he may make war, is regarded and treated as guilty of piracy." In the British naval regulations, established by the king in council, published 1826, it is declared, (section four,) that "if any ship or vessel shall be taken, acting as a ship of war or privateer, without having a commission duly authorizing her to do so, her crew shall be considered as pirates, and treated accordingly."

Nevertheless, a capture made by such vessel from an enemy is regarded a good prize, and condemned as a *droit of admiralty*. All agree that *defensive* hostilities on the high seas, as well as on land, without a commission or public authority, are not criminal acts, but acts fully authorized by the laws of war. (*Kent, Com. on Am. Law*, vol. 1, pp. 94–96; *Vattel, Droit des Gens*, liv. 3, ch. 15, § 226; *Bynkershoek, Quaest. Jur. Pub.*, lib. 1, caps. 18, 20; *Martens, Precis du Droit des Gens*, § 264; *Manning, Law of Nations*, pp. 114–153; *Martens, Essai sur les Armateurs*, ch. 1, §§ 5–7; *Ward, Law of Nations*, vol. 1, p. 295; *Heffier, Droit International*, § 124; *Bello, Derecho Internacional*, pt. 2, cap. 4, §§ 1, 2; *Hautefeuille, Des Nations Neutres*, tit. 3, ch. 2; *Massé, Droit Commercial*, liv. 2, tit. 1, ch. 2; *Wheaton, Elem. Int. Law*, pt. 4, ch. 2, § 9; *Robinson, Collectanea*, p. 21; *Sparks, Dip. Correspondence*, vol. 1, p. 448; *Journals of Congress*, vol. 7, p. 187; *The Georgiana*, 1 *Dod. Rep.*, p. 397; *The Dos Hermanos*, 10 *Wheaton Rep.*, p. 306; *The Nereide*, 9 *Oranch. Rep.*, p. 449; *The Amiable Isabella*, 6 *Wheaton Rep.*, p. 1; *Brown v. The U. S.*, 8 *Oranch. Rep.*, p. 132.)

§ 11. Since about the beginning of the fifteenth century, a public license or commission has been considered necessary in order to authorize private vessels to cruise against the enemy. In order to encourage *privateering*, it is usual to allow the owners of such vessels to appropriate to themselves a portion, at least, of the property they may capture; and, as a necessary precaution against abuse, such owners are required to give adequate security that they will conduct the cruise according to the laws and usages of war, and bring their prizes in for adjudication. But this depends upon the municipal regulations of each particular state, and the instructions of the particular government which issues the commission or license. All commercial states have deemed checks of this kind essential to their own character and safety, as well as for the protection of the rights of neutrals. But even with these precautions, privateering is usually accompanied by abuses and enormous excesses. The use of *privateers*, or private armed vessels under *letters of marque and reprisal*, has often been discussed by publicists and text-writers on international law, and has recently been made the subject of diplo-

matic correspondence and negotiation between the United States and the principal European powers. The general opinion of text-writers is, that privateering, though contrary to national policy and the more enlightened spirit of the present age, is, nevertheless, allowable under the general rules of international law. It leads to the worst excesses and crimes, and has a most corrupting influence upon all who engage in it, but cannot be punished as a breach of the law of nations. The enlightened opinion of the world is most decidedly in favor of abolishing it, and recent events lead to the hope that all the commercial nations of both hemispheres will unite in no longer resorting, in time of war, to so barbarous a practice. Nevertheless, it being generally supposed that privateers furnish to the smaller maritime powers a powerful instrument of war against the military marine of an enemy, it is not easy to obtain their consent to its entire abolition. (*Vattel, Droit des Gens*, liv. 8, ch. 15, § 229; *Kent, Com. on Am. Law*, vol. 1, pp. 97, 98; *Wheaton, Elem. Int. Law*, pt. 4, ch. 2, § 10; *Bynkershoek, Quaest. Jur. Pub.*, lib. 1, cap. 19; *Martens, Precis du Droit des Gens*, § 289; *Mably, Droit Public*, ch. 12, § 1; *Emerigon, Traité des Assurances*, ch. 12, sec. 85; *Edinburg Review*, vol. 8, pp. 13-15; *North American Review, N. S.*, vol. 2, p. 166; *Polson, Law of Nations*, sec. 6; *Manning, Law of Nations*, pp. 116, 117; *Ortolan, Diplomatie de la Mer.*, tome 2, lib. 3, ch. 1; *Pistoye et Duverdy, Traité des Prises*, tit. 4, ch. 2, sec. 1; *Heffter, Droit International*, § 124; *De Cussy, Droit, Maritime*, liv. 1, tit. 3, §§ 20, 21; *Franklin's Works*, vol. 2, pp. 18, 15, 447, et seq; *Hautefeuille, Droit Maritime*, liv. 1, tit. 2, § 29; *Valin, Com. sur l'Ord.*, liv. 3, tit. 9; *Encyclopædia Americana*, verb. *Privateering*.)

§ 12. The efforts, however, which Mr. Wheaton says "have been made by humane and enlightened individuals to suppress it (privateering,) as inconsistent with the liberal spirit of the age," have already produced their effects upon the conduct of belligerent nations, although they have not yet been able to change the law which tolerates it. During the war between the United States and Mexico, no letters of marque, it is believed, was issued by either party; Mexico offered commissions for privateers, but neutral states forbid their subjects to accept them. In the recent war between

Russia, on the one side, and Turkey, France, England, and Sardinia, on the other, the allied powers resolved to issue no letters of marque, and the other states of Europe strictly prohibited their subjects from any participation, by accepting letters of marque, or otherwise, in aiding the belligerents. An Austrian decree of May 25th, 1854, prohibits the subjects of his Imperial Majesty from using letters of marque, or any participation in the armament of a vessel, no matter under what flag, and if they infringe that order, they will not only be deprived of the protection of the Austrian government, and liable to be punished by another state, but will also be proceeded against in the criminal courts of Austria. The entry of foreign privateers, into Austrian courts, is forbidden. An almost simultaneous order, issued by the Queen of Spain, prohibited proprietors, masters, or captains of Spanish vessels, from taking letters of marque from any foreign power, or giving them aid, unless in the cause of humanity, in the case of fire or shipwreck. Denmark, and Sweden, and Norway, gave notice to all friendly powers that, during the existing contest, privateers would not be admitted into their ports, nor tolerated in the anchorage of their respective states. Other governments issued similar orders with respect to their own subjects engaging (either directly or indirectly,) in privateering against the shipping or commerce of any of the belligerents, and the secretary of state of the United States, in reply to the notes of the English and French ministers, communicating the resolutions of the two allied powers not to authorize privateering, said, "the laws of this country impose severe restrictions, not only upon its own citizens, but upon all persons who may be residents within any of the territories of the United States, against equipping privateers, receiving commissions, or enlisting men therein, for the purpose of taking part in any foreign war." (*Wheaton, Elem. Int. Law*, pt. 2, ch. 2, § 10, note; *Hautefeuille, Des Nations Neutres*, tit. 3, ch. 2; *Cong. Doc.*, 33d Cong., 1st. Sess., *H. Rep. Ex. Doc. No. 103*; *Manning, Law of Nations*, pp. 116-117; *Ortolan, Diplomatie de la Mer.*, tome 2, ch. 3; *Martens, Precis du Droit des Gens*, § 289; *Pistoye, et Duverdy, Traité des Prises*, tit. 4, ch. 2; *Massé, Droit Commercial*, liv. 2, tit. 1, ch. 2; *De Cussy, Droit Maritime*, liv. 1, tit. 3, § 20.)

§ 13. On the 16th of April, 1856, at the Conference of Paris, the plenipotentiaries of Great Britain, France, Austria, Russia, Prussia, Sardinia, and Turkey, adopted a "declaration concerning maritime law," containing the following principles, which were made indivisible: "1. *Privateering is, and remains abolished.* 2. The neutral flag covers enemy's goods, with the exception of contraband of war. 3. Neutral goods, with the exception of contraband of war, are not liable to capture under an enemy's flag. 4. Blockades, in order to be binding, must be effective; that is to say, maintained by a force sufficient really to prevent access to the coasts of the enemy."

This declaration was not to be "binding, except between those powers which have acceded to, or shall accede to it;" but it was also agreed, by the plenipotentiaries, that the powers which had, or should agree to it, "cannot hereafter enter into any arrangement in regard to the application of the right of neutrals in time of war, which does not, at the same time, rest on the four principles which are the objects of the said declaration." (*Protocols*, Nos. 23 and 24, *Congress of Paris*, 1856; *President's Message*, Aug. 12th, 1856; *Phillimore, On Int. Law*, vol. 3, app., p. 850; *Ortolan, Diplomatie de la Mer*, tome 2, app., special, pp. 516-518; *Hautefeuille, Des Nations Neutres*, tit. 3, ch. 2; *Heffter, Droit International*, appendice 3; *De Cussy, Droit Maritime*, liv. 1, tit. 2, § 20.)

§ 14. This declaration of the six powers of the Paris conference was communicated to other states, and it was stated, in the memorandum of the French minister of foreign affairs to the Emperor, dated June 12th, 1858, that the following powers had signified their full adhesion to all the four principles, viz: Baden, Bavaria, Belgium, Bremen, Brazil, the Duchy of Brunswick, Chile, the Argentine Confederation, the Germanic Confederation, Denmark, the Two Sicilies, Ecuador, the Roman States, Greece, Guatemala, Hayti, Hamburg, Hanover, the Two Hesses, Lubeck, Mecklenburg-Strelitz, Mecklenburg-Schwerin, Nassau, Oldenburg, Parma, the Netherlands, Peru, Portugal, Saxony, Saxe-Altenburg, Saxe-Coburg-Gotha, Saxe-Meiningen, Saxe-Weimar, Sweden, Switzerland, Tuscany, Wurtemberg. The executive government of Uruguay also gave its full assent to all the

four principles, subject to the ratification of the legislature. Spain and Mexico adopted the last three as their own, but, on account of the first article, declined acceding to the entire declaration. The United States adopted the second, third and fourth propositions, independently of the first, offering, however, to adopt that also, with the following amendment, or additional clause: "*And the private property of the subjects, or citizens of a belligerent on the high seas, shall be exempted from seizure by public armed vessels of the other belligerent, except it be contraband.*" The proposition, thus extended, has been accepted by Russia, and some other states have signified their approbation of it. There is reason to hope that all the maritime nations of Europe will eventually adopt the extension. But if they should not, the United States will stand almost alone in their adhesion to, and advocacy of, privateering — a practice condemned by their earliest statesmen and best writers on public law, and now abandoned by its former advocates and supporters in Europe. The abstract right, under the law of nations, to use privateers, cannot be questioned; and it must also be observed that the advantage to be derived from the use of private armed vessels, in case of war, would be much greater to the United States than to any European power; moreover, that these European states, now most active in advocating the abolition of privateering, were its strongest supporters when it was most conducive to their own power. Unfortunately, nations, like individuals, are more influenced by immediate self-interest, than by the progress of civilization, the ultimate peace of the world, and the happiness of the human race. (*Marcy, Letter to Count Sartiges, July 28th, 1856; President's Message, Aug. 12th, 1856; The Paris Moniteur, July 14th, 1858; Heffter, Droit International, § 124; Lawrence, Visitation and Search, p. 195; Hautefeuille, Des Nations Neutres, tit. 3, ch. 2; De Cussy, Precis Historique, ch. 12.*)

§ 15. It being established that a belligerent has a right to commission and use private armed vessels in carrying on the war, it remains to inquire by whose authority such commissions may be issued, and who may use them. The right to issue letters of marque is inherent in the government of every independent state, and is a part of its war-making



power; but its own constitution, or internal laws, must determine by what particular branch of the government this right is to be exercised. When, in 1569, the Prince of Orange issued letters of marque to the gentleman and others, who became so notorious as the *Gueux de Mer*, many of them were punished as pirates; "not so much," says Martens, "on account of their excesses, as because it was not thought that the Prince of Orange had power to grant such letters of marque." The authority which grants the commission determines what limits shall be imposed upon the exercise by the privateer of belligerent rights; and, if such vessel exceed the limits of its commission, and commit acts of hostility not warranted by the letter which it carries, if such acts be not in violation of the laws of war, it is responsible to and punishable by the state alone from which the commission was issued. "A vessel," says Phillimore, "which takes a commission from *both belligerents* is guilty of piracy, for one authority conflicts with the other. But a nicer question has arisen with respect to a vessel which sails under two or more commissions granted by *allied powers* against a *common enemy*. The better opinion seems to be, that such practice is irregular and inexpedient, but does not carry with it the substance or name of piracy." Kent does not make this distinction, but states the proposition in general terms, "that a cruiser, furnished with commissions from two different powers, is liable to be treated as a pirate." Hautefeuille says, that if a privateer receives commissions from two sovereigns, she is to be treated as a pirate, "even when the letters of marque *emanate from two princes allied for a common war*." Another question to be noticed, is, what is the character of a vessel of a *neutral* state, armed as a privateer, with a commission from one of the belligerents? Phillimore says: "That such a vessel is guilty of a gross infraction of international law, that she is not entitled to the liberal treatment of a vanquished enemy, is wholly unquestionable; but it would be difficult to maintain that the character of piracy has been stamped upon such a vessel by the decision of international law." Kent is of opinion that the law of the United States, which declares such an act a high misdemeanor, punishable by fine and imprisonment, to be "in affirmance of the law of nations."

Ortolan thinks that such an act is not piracy in international law, but that it ought to be made so. Hautefeuille is of opinion that they are not to be treated as pirates, unless made so by interior laws or treaty stipulations of the neutral state. We have already alluded to the recent internal laws and instructions of European states on this question, and will only add here, that, by the law of Plymouth colony, in 1682, it was declared to be felony to commit hostilities on the high seas, under the flag of any foreign power, upon the subjects of another power in amity with England; and the same acts were declared to be felony by the law of the colony of New York, in 1699. (*Kent, Com. on Am. Law*, vol. 1, p. 100; *Phillimore, On Int. Law*, vol. 1, § 358; *Wheaton, Elem. Int. Law*, pt. 4, ch. 2, § 10, note a.; *Bynkershoek, Quaest. Jur. Pub.* liv. 1, cap. 17; *Vattel, Droit des Gens*, liv. 3, ch. 15, § 229; *Klüber, Droit des Gens*, § 260; *Ortolan, Dip. de la Mer*, liv. 2, ch. 11; *Hautefeuille, Des Nations Neutres*, tit. 3, ch. 2; *Duponceau, Translation of Bynkershoek*, p. 129; *Bailre, Historical Memoirs*, vol. 2, pt. 4, § 35; *Smith, Laws of the Colony of N. Y.*, vol. 1, p. 25; *Manning, Law of Nations*, p. 114; *Abreu, Tratado de las Presas*, pt. 2, cap. 1, §§ 7, 8; *Martens, Essai sur les Armateurs*, ch. 2, § 14; *Massé, Droit Commercial*, liv. 2, tit. 1, ch. 2.)

§ 16. Some states have covenanted, in their treaty stipulations, that they will prevent their subjects, under heavy penalties, from accepting commissions or letters of marque from other states. Such was the character of the treaty of September 26th, 1786, between France and England. In other treaties, it is stipulated that no subject, or citizen of either of the contracting powers, shall accept a commission or letter of marque to assist an enemy in hostilities against the other, under pain of being treated as a pirate. Such is the character of the treaties entered into between the United States and France, Holland, Sweden, Prussia, Great Britain, Spain, Columbia, Chile, etc. Some of these treaties, however, have expired without this provision being renewed in any subsequent treaty. It may be remarked, that whatever be thought of the character, in international law, of a neutral vessel taking a commission from a belligerent, the other belligerent is justified in treating such vessel as a pirate, when it is so stipulated in a treaty with the neutral state, or

when the laws of the neutral state declare such acts to be piracy. This case is readily distinguishable from that in which the slave trade is made piracy by the municipal law of a particular state, for such trade is not considered as prohibited by the law of nations. (*Wheaton, Elem. Int. Law*, pt. 4, ch. 2, § 10, note a; *Kent, Com. on Am. Law*, vol. 1, p. 100; *Phillimore, On Int. Law*, vol. 1, § 358; *Hautefeuille, Des Nations Neutres*, tit. 3, ch. 2; *U. S. Statutes at Large*, vol. 8, passim.; *Martens, Recueil de Traités*, vol. 4, p. 156; *Ortolan, Dip. de la Mer*, liv. 2, ch. 11; *Hauterive et De Cussy, Recueil des Traités*, tome 2, p. 88; *De Cussy, Droit Maritime*, liv. 1, tit. 3, § 21.)

§ 17. The implements of war, which may be lawfully used against an enemy, are not confined to those which are openly employed to take human life, as swords, lances, fire-arms and cannon; but also include secret and concealed means of destruction, as pits, mines, etc. So, also, of new inventions and military machinery of various kinds; we are not only justifiable in employing them against the enemy, but also, if possible, of concealing from him their use. The general effect of such inventions and improvements is thus described by a distinguished American statesman: "Every great discovery in the art of war, has a life-saving and peace-promoting influence. The effects of the invention of gunpowder are a familiar proof of this remark, and the same principle applies to the discoveries of modern times. By perfecting ourselves in military science — paradoxical as it may seem — we are therefore assisting in the diffusion of peace, and hastening the approach of that period when 'swords shall be beaten into ploughshares, and spears into pruning-hooks; when nation shall not lift up sword against nation, neither shall they learn war any more.'" The same views are expressed by Ortolan and other recent writers on the laws and usages of war. At one period, however, it was considered contrary to the rules of military honor and etiquette to make use of unusual implements of war. Thus, the French vice-admiral, Marshal Conflans, issued an order of the day, on the 8th of November, 1759, forbidding the use of hollow shot against the enemy, on the ground that they were not generally employed by polite nations, and that the French ought to fight according to the rules of honor. The

same view was taken of the use of hot shot, grape, chain-shot, split balls, etc. (*De Cussy, Droit Maritime*, liv. 1, tit. 2, § 24; *Klüber, Droit des Gens. Mod.*, § 244; *Martens, Precis du Droit des Gens*, § 273; *Phillimore, On Int. Law*, vol. 3, § 94; *Vattel, Droit des Gens*, liv. 8, ch. 2, § 6; *Butler, B. F., Address on the Military Profession*, p. 25; *Ortolan, Diplomatie de la Mer*, liv. 3, ch. 1; *Heffler, Droit International*, § 125.)

§ 18. But while the laws of war allow the use of new invention of arms, or other means of destruction, against the life and property of an enemy, there is a limit to this rule beyond which we cannot go. It is necessity alone that justifies us in making war and in taking human life, and there is no necessity for taking the life of an enemy who is disabled, or for inflicting upon him injuries which in no way contribute to the decision of the contest. Hence, we are forbidden to use poisoned weapons, for these add to the cruelty and calamities of a war, without conducing to its termination. We may wound an enemy in order to disable him, but, when so disabled, we have no right to take his life; we, therefore, cannot introduce poison into that wound so as, subsequently, to cause his death. "It is, therefore, with good reason," says Vattel, "and in conformity with their duty, that civilized nations have classed, among the laws of war, the maxim which prohibits the poisoning of arms." (*Leiber, Political Ethics*, b. 7, §§ 24, 25; *Vattel, Droit des Gens*, liv. 3, ch. 8, § 156; *Grotius, de Jur. Bel. ac Pac.*, lib. 3, cap. 4, § 16; *Ortolan, Diplomatie de la Mer*, tome 2, liv. 3, ch. 1; *Phillimore, On Int. Law*, vol. 3, § 94; *De Felice, Droit de la Nat.*, etc., tome 2, lec. 25; *Heffler, Droit International*, § 125; *Paley, Moral and Pol. Philosophy*, b. 6, ch. 12; *Burlamaqui, Droit de Nat. et des Gens*, tome 5, pt. 4, ch. 6; *Real, Science du Gouvernement*, tome 5, ch. 2, sec. 6, § 4; *De Cussy, Droit Maritime*, liv. 1, tit. 2, § 24.)

§ 19. The practice of poisoning wells, springs, waters, or any kind of food, for the purpose of injuring an enemy, is now also universally condemned. In addition to the reasons given for prohibiting the use of poisoned weapons, there is the additional one, that, by poisoning waters and food, we may destroy innocent persons, and non-combatants. The practice

is, therefore, condemned by all civilized nations, and any state or general who should resort to such means, would be regarded as an enemy to the human race, and excluded from civilized society. (*Vattel, Droit des Gens*, liv. 3, ch. 8, § 157; *Grotius, de Jur. Bel. ac Pac.*, lib. 8, cap. 4, § 17; *Leiber, Political Ethics*, b. 7, §§ 24, 25; *Ortolan, Diplomatie de la Mer*, tome 2, liv. 3, ch. 1; *Garden, De Diplomatie*, liv. 6, § 7; *Rayneval, Inst. du Droit Nat.*, etc., liv. 3, ch. 4; *Heffter, Droit International*, § 125; *Paley, Moral and Pol. Philosophy*, b. 6, ch. 12; *Burlamaqui, Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 6; *De Cussy, Droit Maritime*, liv. 1, tit. 3, § 24.)

§ 20. The same may be said of assassination, or treacherously taking the life of an enemy. Not unfrequently the success of a campaign, or even the termination of the war, depends upon the life of the sovereign, or of the commanding general. Hence, in former times, it sometimes happened that a resolute person was induced to steal into the enemy's camp, under the cover of a disguise, and, having penetrated to the general's quarters, to surprise and kill him. Such an act is now deemed infamous and execrable, both in him who executes, and in him who commands, encourages, or rewards it. The consuls, Caius Fabricius and Quintus Æmilius, rejected, with horror, the proposal of Pyrrhus' physician, to poison his master, and cautioned that prince to be on his guard against the traitor. The proposal of the prince of the Catti, to destroy Arminius, was rejected, although Arminius had treacherously cut off Varus, together with three Roman legions, both the senate and Tiberius deeming it unlawful to poison even a perfidious enemy. It was on the same principle that Alexander formed his judgment of Bessus, who had assassinated Darius. During the middle ages, however, war degenerated into cruelty and barbarism, and poisons and assassinations were frequently resorted to. The assassination of William, prince of Orange, by the Spaniards, in the war of the Netherlands, is now regarded with universal detestation. But this detestation of the civilized world is not confined to the perpetrators of such acts; those who command, encourage, countenance, or reward them, are equally execrated. And a government, or a general, who should neglect to punish a subject, or a subordinate, for such

a crime, would be justly regarded as odious. (*De Felice, Droit de la Nature, etc.*, tome 2, lec. 25; *Vattel, Droit des Gens*, liv. 3, ch. 8, § 155; *Leiber, Political Ethics*, b. 7, §§ 24, 25; *Bynkershoek, Quaest. Jur. Pub.*, lib. 1, cap. 1; *Polson, Law of Nations*, sec. 6; *Wildman, Int. Law*, vol. 2, p. 24; *Garden, De Diplomatie*, liv. 6, § 7; *Rayneval, Inst. du Droit Nat.*, liv. 3, ch. 4; *Paley, Moral and Pol. Philosophy*, b. 6, ch. 12; *Burlamaqui, Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 6; *Real, Science du Gouvernement*, tome 5, ch. 2, sec. 6, § 5; *De Cussy, Droit Maritime*, liv. 1, tit. 3, § 24.)

§ 21. But we must distinguish between a treacherous murder and a surprise, which is always allowable in war. A small force, under cover of the night, may pass the enemy's lines, penetrate to his headquarters, surprise the general, and take him prisoner or attack and kill him. It was his duty to guard against such attacks, and to prevent a surprise. Such acts are, therefore, not only justifiable, but commendable; it is the disguise and treachery which gives to the deed the character of murder or assassination. The conduct of Leonidas and the Lacedaemonians, who broke into the enemy's camp, and made their way directly to the Persian monarch's tent, was justified by the common rules of war, and did not authorize the king to treat them more rigorously than any other enemies. The act of Mutius Scaevola, in entering, in disguise, the tent of Porsenna, with the intention of killing him, was praised by the age in which he lived, but would not be justified by the rules of modern warfare. (*Grotius, de Jur. Bel. ac Pac.*, lib. 3, cap. 4, §§ 15, 16, 18; *Vattel, Droit des Gens*, liv. 3, ch. 8, § 155; *Bynkershoek, Quaest. Jur. Pub.*, lib. 1, cap. 1; *Phillimore, On Int. Law*, vol. 3, § 94; *Rayneval, Inst. du Droit Nat., etc.*, liv. 3, ch. 4; *Ortolan, Diplomatie de la Mer*, tome 2, liv. 3, ch. 1; *De Felice, Droit de la Nat., etc.*, tome 2, lec. 25; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 12; *Burlamaqui, Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 6; *De Cussy, Droit Maritime*, liv. 1, tit. 3, § 24.)

§ 22. War makes men public enemies, but it leaves in force all duties which are not necessarily suspended by the new position in which men are placed toward each other. Good faith is, therefore, as essential in war as in peace, for without it hostilities could not be terminated with any degree of

safety, short of the total destruction of one of the contending parties. This being admitted as a general principle, the question arises, how far we may deceive an enemy, and what stratagems are allowable in war? Whenever we have expressly or tacitly engaged to speak truth to an enemy, it would be perfidy in us to deceive his confidence in our sincerity. But if the occasion imposes upon us no moral obligation to disclose to him the truth, we are perfectly justifiable in leading him into error, either by words or actions. Feints, and deceptions of this kind are always allowable in war. It is the breach of good faith, express or implied, which constitutes the perfidy, and gives to such acts the character of *lies*. (*Phillimore, On Int. Law*, vol. 3, § 94; *Vattel, Droit des Gens*, liv. 3, ch. 10, §§ 174, 177; *Leiber, Political Ethics*, b. 7, §§ 24, 25; *Wildman, Int. Law*, vol. 2, pp. 24, 25; *Grotius, De Jur. Bel. ac Pac.*, lib. 3, cap. 8, §§ 4, 5; *Puffendorf, de Jure Nat. et Gent.*, lib. 8, cap. 6, § 6; *Garden, De Diplomatie*, liv. 6, § 7; *Bello, Derecho Internacional*, pt. 2, cap. 6, §§ 1, 2; *Paley, Moral and Pol. Philosophy*, b. 8, pt. 1, ch. 15; *De Cussy, Droit Maritime*, liv. 1, tit. 8, § 24.)

§ 23. *Stratagems*, in war, are snares laid for an enemy, or deceptions practiced on him, without perfidy, and consistent with good faith. They are not only allowable, but have often constituted a great share of the glory of the most celebrated commanders. "Since humanity obliges us," says Vattel, "to prefer the gentlest methods in the prosecution of our rights, if, by a stratagem, by a feint devoid of perfidy, we can make ourselves masters of a strong place, surprise the enemy, and overcome him, it is much better, and is really more commendable to succeed in this way than by a bloody siege or the carnage of a battle. Thus, feints and pretended attacks are frequently resorted to, and men or ships are sometimes so disguised as to deceive the enemy as to their real character, and, by this means, enter a place or obtain a position advantageous to their plan of attack or of battle. But the use of stratagems is limited by the rights of humanity and the established usages of war. Even if devoid of perfidy, and consistent with the faith due to the enemy, they must not violate commercial usage, or contravene the stipu-

lations of particular treaties. Vattel mentions the case of an English frigate, which, in the war of 1756, is said to have appeared off Calais and made signals of distress, with a view of decoying out some vessel, and actually seized a boat and some sailors who generously came to her assistance. If the fact be true, that unworthy stratagem deserves a severe punishment. It tends to damp a benevolent charity which should be held sacred in the eyes of mankind, and which is so laudable even between enemies. Moreover, making signals of distress is asking assistance, and, by that very action, promising perfect security to those who give the friendly succor. Therefore the action attributed to that frigate implies an odious perfidy." Ortolan refers to the conduct of an English frigate and two vessels at Barcelona, in 1800, as of the same character as that of the English frigate off Calais, described as above, by Vattel. On the 4th of September, 1800, the English took forcible possession of a Swedish vessel, then neutral, near Barcelona, put a large number of English soldiers and marines on board, and, entering the harbor in the night, under this neutral flag, and in a neutral vessel, surprised and captured two Spanish frigates which were lying at anchor. Ortolan denounces this as an act of perfidy, and as not being a stratagem allowable by the usages of war. This act may be viewed in different lights. So far as the surprise of the Spaniards is concerned, it was a legitimate stratagem. It was their duty to be prepared for such an attack, and they were properly punished for their neglect to take the proper and ordinary precautions to prevent it. So far as the seizure, and the use of the Swedish vessel, and the treatment received by its captain and crew at the hands of the English, are concerned, it was a gross violation of neutral rights which would have justified Sweden in declaring war, on satisfaction being refused. As between Spain and Sweden, it was a gross neglect of neutral duty, on the part of the latter, in not requiring England to restore the captures thus unlawfully made under the Swedish flag. With respect to the actual *attack* made by the English under a false flag, it was a direct violation of their own maritime laws and the established usages of nations, as will be shown in the next paragraph. (*Grotius, de Jur. Bel. ac Pac.*, lib. 3, cap. 1,



§§ 8, 17; *Bynkershoek, Quaest. Jur. Pub.*, lib. 1, cap. 1; *Leiber, Political Ethics*, b. 7, §§ 24, 25; *Wildman, Int. Law*, vol. 2, p. 25; *The Peacock*, 4 *Rob. Rep.*, p. 187; *Ortolan, Diplomatie de la Mer*, tome 2, liv. 3, ch. 1; *Martens, Precis du Droit des Gens*, § 274; *Rayneval, Inst. du Droit Nat., etc.*, liv. 8, ch. 4; *Vattel, Droit des Gens*, liv. 3, ch. 10, § 178; *Bello, Derecho Internacional*, pt. 2, cap. 6, § 2; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 12; *Paley, Moral and Pol. Philosophy*, b. 3, pt. 1, ch. 15.)

§ 24. We will now inquire how far stratagems of this kind are allowable at sea, or rather how far a vessel may act under false colors. "To sail and chase under false colors," says Sir William Scott, "may be an allowable stratagem in war, but *firing*, under false colors, is what the maritime law of this country (England) does not permit; for it may be attended with very unjust consequences; it may occasion the loss of the lives of persons, who, if they were apprised of the real character of the cruiser, might, instead of resisting, implore protection." It will be noticed that the prohibition to fire under false colors, is here put upon the ground of local law, no reference being made to any general rule of international jurisprudence. "It is a rule of the law of nations," say Pictoye et Duverdy, "that, on the sea, a vessel cannot attack another vessel before having made known its nationality, and having put the vessel which it encounters in a position of declaring its own nationality." The ancient rule of maritime law, as stated by Valin, was, that the *affirming gun* (*coup de semonce ou d'assurance*) could be fired only under the national flag. Such were the provisions of the ancient ordonnances of France. But article thirty-three of the Arrêté du 2 prairial merely prohibits the firing a shot (*tirer à boulet*) under a false flag, and the law of the 10th of April, 1825, article third, provides that captains and officers, who *commit acts of hostility* under a flag other than that of the state by which they are commissioned, shall be treated as pirates. Ortolan says that the affirming gun may be fired under false colors, but all acts of hostility must be under the national flag. Massé and Hautefeuille seem to adopt the opinion that the affirming gun (*coup de semonce*) should be fired only under national colors. But as such gun is in no respect an act of hostility,

we can perceive no good reason why it may not be fired under false colors. (*Wildman, Int. Law*, vol. 2, p. 25; *The Peacock*, 4 *Rob. Rep.*, p. 187; *Pistoye et Duverdy, Traité des Prises*, tit. 5, ch 1; *Massé, Droit Commercial*, tome 1, § 307; *Hautefeuille, Droit des Nations Neutres*, tome 4, p. 8; *Valin, Traité des Prises*, ch. 2, sec. 1, § 9; *Ortolan, Diplomatie de la Mer.*, tome 2, lib. 3, ch. 1; *Lebeau, Nouveau Code des Prises*, tome 6, pp. 223, 238; *De Cussy, Droit Maritime*, liv. 1, tit. 8, § 25.)

§ 25. *Deceitful intelligence* may be divided into two classes; false representations made in order that they may fall into the enemy's hands and deceive him, and the representations of one who feigns to betray his own party, with a view of drawing the enemy into a snare; both are justifiable by the laws of war. Commanders sometimes make false representations of the number and position of their troops, and of their intended military operations, for the purpose of having them fall into the enemy's hands, and of deceiving him; this is not only allowable, but is regarded as a commendable *ruse de la guerre*. If an officer deliberately makes overtures to an enemy, offering to betray his own party, and then deceives that enemy with false information, his procedure is deemed infamous; nevertheless, the enemy has no right to complain of the treachery, for he should not have expected good faith in a traitor. But if the officer has been tampered with by offers of bribery, he may lawfully feign acquiescence to the proposal, with the view to deceive the seducer; he is insulted by the attempt to purchase his fidelity, and he is justified in revenging himself by drawing the tempter into a snare. "By this conduct," says Vattel, "he neither violates the faith of promises, nor impairs the happiness of mankind, for criminal engagements are absolutely void, and ought never to be fulfilled, and it would be a fortunate circumstance if the promises of traitors could never be relied on, but were, on all sides, surrounded with uncertainties and danger. Therefore, a superior, on information that the enemy is tempting the fidelity of an officer or soldier, makes no scruple of ordering that subaltern to feign himself gained over, and to arrange his pretended treachery so as to draw the enemy into an ambuscade." (*De Cussy, Droit Maritime*, liv. 1, tit. 3, § 24;

*Grotius, de Jur. Bel. ac Pac.*, lib. 3, cap. 1, §§ 8, 17; *Puffendorf, de Jure Nat. et Gent.*, lib. 8, cap. 6, § 6; *Vattel, Droit des Gens*, liv. 3, ch. 10, § 182; *Leiber, Political Ethics*, b. 7, §§ 24, 25; *Wildman, Int. Law*, vol. 2, pp. 24, 25; *Paley, Moral and Pol. Philosophy*, b. 8, pt. 1, ch. 15.)

§ 26. *Spies* are persons who, *in disguise*, or *under false pretenses*, insinuate themselves among the enemy, in order to discover the state of his affairs, to pry into his designs, and then communicate to their employer the information thus obtained. The employment of spies is considered a kind of clandestine practise, a deceit in war, allowable by its rules. "Spies," says Vattel, "are generally condemned to capital punishment, and not unjustly; there being scarcely any other way of preventing the mischief which they may do. For this reason, a man of honor, who would not expose himself to die by the hand of a common executioner, ever declines serving as a spy. He considers it beneath him, as it seldom can be done without some kind of treachery. The sovereign, therefore, cannot lawfully require such a service of subjects, except, perhaps, in some singular case, and that of the last importance. It remains for him to hold out the temptation of a reward, as an inducement for mercenary souls to engage in the business. If those whom he employs make a voluntary tender of their services, or if they be neither subject to, nor in anywise connected with, the enemy, he may unquestionably take advantage of their exertions, without any violation of justice or honor." No authority can require of a subordinate a treacherous or criminal act in any case, nor can the subordinate be justified in its performance by any orders of his superior. Hence the odium and punishment of the crime must fall upon the spy himself, although it may be doubted whether the employer is entirely free from the moral responsibility of holding out *inducements* to treachery and crime. That a general may profit by the information of a spy, the same as he may accept the offers of a traitor, there can be no question; but to seduce the one to betray his country, or to induce the other, by promises of reward, to commit an act of treachery, is a very different matter. The term *spy* is frequently applied to persons sent to reconnoitre an enemy's position, his forces, defenses, etc., but not in disguise, or under false pretenses.

Such, however, are not *spies* in the sense in which that term is used in military and international law, nor are persons so employed liable to any more rigorous treatment than ordinary prisoners of war. It is the *disguise*, or *false pretense*, which constitutes the perfidy, and forms the essential elements of the crime, which, by the laws of war, is punishable with an ignominious death. Article one hundred and one of the rules and articles for the government of the armies of the the United States, provides "that, in time of war, all persons not citizens of, or owing allegiance to, the United States of America, who shall be found lurking, *as spies*, in or about the fortifications or encampments of the armies of the United States, or any of them, shall suffer death, according to the law and usage of nations, by sentence of a general court martial." (*Vattel, Droit des Gens*, liv. 3, ch. 10, § 179; *Grotius, De Jur. Bel. ac Pac.*, lib. 3, cap. 4, § 18; *U. S. Statutes, Act of April 10th, 1806*; *Cross, Military Laws*, p. 123; *Martens, Precis du Droit des Gens*, § 274; *Rayneval, Inst. du Droit Nat.*, etc., liv. 3, ch. 4; *De Felice, Droit de la Nat.*, etc., tome 2, lec. 24; *Bello, Derecho Internacional*, pt. 2, cap. 6, § 2; *Heffter, Droit International*, § 250; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 12; *De Cussy, Droit Maritime*, liv. 1, tit. 3, § 24.)

§ 27. Notwithstanding the criminal character of a spy, it has not unfrequently happened that men of high and honorable feelings have been induced to undertake the office: and, although this fact has somewhat lessened, in popular opinion, the odium of the act, it has failed to diminish the severity of its punishment. Two of the most notable instances of this kind to be found in military history, occurred during the war of the American revolution. After the retreat of Washington from Long Island, Captain Nathan Hale re-crossed to that island, entered the British lines, *in disguise*, and obtained the best possible intelligence of the enemy's forces, and their intended operations; but, in his attempt to return, he was apprehended, and brought before Sir William Howe, who gave immediate orders for his execution *as a spy*. and these orders were carried into execution the very next morning, under circumstances of unnecessary rigor, the prisoner not being allowed to see a clergyman, nor even the use of a bible, although he respectfully asked for both. Every

one remembers the story of Major André,—how he ascended the Hudson river, within the American lines, where he bargained with Arnold for the surrender of West Point and its defenses; how he was captured in his attempt to return to New York *in disguise*, and with the documentary evidence of his bribery of Arnold concealed upon his person; and how, after a full examination, and due deliberation, he was condemned, and ordered by Washington to be executed *as a spy*. These two officers,—Hale and André,—were nearly of equal rank and age; both had talents and accomplishments, which gave promise of future greatness, and which had already endeared them to large circles of admiring friends. They both committed the same military offense, and both suffered the same punishment, but, with this difference, that while the British did everything in their power to add to the ignomy of Hale's execution, the Americans spared no exertions to lighten the hours of André's captivity, and to show their regret that the stern exigencies of the war required his death. Again, while the Americans unanimously condemned the barbarous treatment which Hale received before his execution, they, with equal unanimity, acknowledged the justice of his sentence. Many of the English, on the contrary, while acknowledging the kind treatment of André by the American officers, and their expressions of sympathy for his fate, not only complained, at the time, that his sentence was unjust, and his execution a "blot" upon the reputation of Washington, but these charges have since been repeated by some of their ablest writers, and especially by Lord Mahon in his "History of England," and by Phillimore in his "Commentaries of International Law." It is not denied that André was within the American lines, *in disguise*, for the purpose of gaining information of the disposition of our forces, and of closing negotiations with Arnold for their surrender; but, it is contended, that being there with the authority of Arnold, and under a passport from him, he was not legally *a spy*. André, himself, never attempted so firmly a defense; he scorned all prevarication, and was condemned on his own confessions. His defenders seem to forget that the passport of a traitor, given for treasonable purposes, could afford no protection. It had no more legal force than

Arnold's agreement to surrender the American defenses; if Washington was bound to recognize this passport, he was equally bound to carry out the entire agreement, by surrendering to the enemy West Point and its garrison! Moreover, even though André had not been a spy, in the strict technical meaning of that term, he, nevertheless, deserved death, for the laws of war impose that punishment upon any one who attempts to seduce the fidelity of an officer by bribery, or to induce a soldier to desert his colors. And this penalty is now prescribed by the statute of the United States. (*Philimore, On Int. Law*, vol 3, § 106; *Mahon, Hist. of England*; *Hamilton, Hist. of the Republic*, vol. 1; *Sargeant, Life of Major André*; *Holmes, Annals*.)

§ 28. While all agree that we have no right to require any man to perform the services of a spy, and that if we attempt to tamper with the fidelity of an enemy's officer or soldier, we incur the risk of such punishment as that enemy, under the laws of war, may impose, there is a difference of opinion with regard to our rewarding such acts. Some say that we may purchase treason or desertion, if we merely accept offers which are made to us; while others contend that, if we pay money for the services of a spy, or for the surrender of a fort, or an army, or for traitorous acts which may lead to their capture, we encourage perfidy and treachery nearly as much as though the offer first came from ourselves. Without attempting to decide this question of ethics, we will merely remark that the Romans, in their heroic ages, rejected with indignation every advantage offered by an enemy's subjects. They sent back to the Falsci, bound and fettered, the traitor who had offered to deliver up the King's children; and they refused to make any account of the victory of their Consul over Viriatus, because it had been obtained by means of bribery. In speaking of the lawfulness of such acts, Vattel remarks, that although generals practice them, they are never heard to boast of having done so. (*Vattel, Droit des Gens*, liv. 3, ch. 10, §§ 180, 182; *Pinheiro-Ferreira, Notes sur Vattel*, tome 2, n. 73; *Bello, Derecho Internacional*, pt. 2, cap. 6, § 3; *Heffter, Droit International*, § 125; *Titus Livius*, lib. 42, cap. 47; *Valerius Maximus*, lib. 9, cap. 6; *Eutropius*, lib. 4, cap. 8.)

§ 29. It sometimes happens in war that intestine divisions prevail among the enemy's forces, and that one party may favor the objects for which we are contending; in such cases we may, without scruple, hold correspondence with the one faction, and avail ourselves of its assistance to overthrow the other party. We thus promote our own interest and gain the objects of the war, without seducing any one to crime, or even becoming the partakers of treachery. The right to side with a faction in war is broadly different from the pretended right of forcible intervention in time of peace. A third party may side with the one or the other of the conflicting forces, just as he might in a war between separate and independent nations. If he have just cause of war against one of the parties, he may avail himself of the assistance of the other. (*Vattel, Droit des Gens*, liv. 3, ch. 10, § 181; *Kent, Com. on Am. Law*, vol. 1, p. 25; *Bello, Derecho Internacional*, pt. 2, cap. 6, § 3.)

## CHAPTER XVII.

### THE ENEMY AND HIS ALLIES.

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§ 1. It has already been stated that a war, duly commenced and ratified, is not confined to the governments or authorities of the belligerent state, but that it makes all the subjects of the one state the legal enemies of each and every subject of the other. This hostile character results from political ties, and not from personal feelings or personal antipathies; their *status* is that of legal hostility, and not of personal enmity. So long as these political ties continue, or so long as the individual continues to be the citizen or subject of one



of the belligerent states, just so long does he continue in legal hostility toward all the citizens and subjects of the opposing belligerent. Public enemies are such, whatever may be their occupation, and in whatever country they may be found. The Romans had a particular term (*Hostis*,) to denote a public enemy, and to distinguish him from a private enemy, whom they dalled *Inimicus*. The distinction is a marked one, and should never be lost sight of. Private enemies have hatred and rancor in their hearts, and seek to do each other personal injury. Not so with public enemies. They do not, as individuals, seek to do each other personal harm. And even where brought into actual conflict, as armed belligerents, there is usually no personal enmity between the individuals of the contending forces. So far from this, when peace is declared, the military forces of the opposing belligerents are usually personal friends, and vie with each other in politeness and mutual kindness. (*Vattel, Droit des Gens*, liv. 3, ch. 5, §§ 69, 70, 71; *Leiber, Political Ethics*, b. 7, § 24; *Massé, Droit Commercial, etc.*, liv. 2, tit. 1, ch. 2; *Alber. Gentilis, De Jur. Bel.*, com. 1, in pr.; *Rutherford, Institutes*, b. 2, ch. 9, § 15.)

§ 2. Moreover, there is a limit to public enmity. The law of nature gives to a belligerent nation the right to use such force as may be necessary, in order to obtain the object for which the war was undertaken. Beyond this, the use of force is unlawful; this necessity forms the limit of hostility between subjects of the belligerent states. They, therefore, have no right to take the lives of non-combatants, or of such public enemies as they can subdue by other means, nor to inflict any injuries upon them or their property, unless the same should be necessary for the object of the war. (*Vattel, Droit des Gens*, liv. 3, ch. 8, § 138; *Wheaton, Elem. Int. Law*, pt. 4, ch. 2, § 2; *Rutherford, Institutes*, b. 2, ch. 9, § 15; *Burlamaqui, Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 6; *Corum v. Blackburn, Doug. Rep.*, p. 644; *Massé, Droit Commercial*, liv. 2, tit. 1, ch. 2; *De Felice, Droit de la Nat., etc.*, tome 2, lec. 25; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 12.)

§ 3. We have already stated the general effect of a declaration of war upon the persons and property of the subjects of

an enemy found within our own territory, and, that while, by the strict rights of war, we can retain them all as prisoners or prizes, this right, by modern usage, is only applied to the military and to ships of war, mere residents, merchants, and merchant vessels, being allowed a certain time to withdraw themselves from our jurisdiction without molestation. Subjects of a neutral state, resident or domiciled in the enemy's country, are, in many respects, to be regarded as enemies; but, as they are not liable to military duty, in the proper sense of that term, they cannot be treated either as actual combatants or as enemy's subjects, who are liable to be called upon by their own state to oppose us by force. Moreover, our own subjects, resident or domiciled in the enemy's country, are, in certain matters relating to trade and the rights of maritime capture, regarded as legal enemies, but not with respect to their personal *status* and personal duties. Again, as belligerents are not permitted to use force against each other within neutral territory, we cannot exercise there the same rights against the person and property of an enemy as we can within our own or enemy's territory, or upon the high seas. The treatment of an enemy, therefore, depends in a measure, upon the place in which he may be found. (*Burlamaqui, Droit de la Nat., etc.*, tome 5, pt. 4, ch. 6; *Vattel, Droit des Gens*, liv. 3, ch. 4, § 68; *Bynkershoek, Quaest. Jur. Pub.*, lib. 1, ch. 7; *Massé, Droit Commercial*, liv. 2, tit. 1, ch. 2; *Ragnenal, Droit de la Nat., etc.*, liv. 3, ch. 5, § 4; *Bello, Derecho Internacional*, pt. 2, cap. 2, § 2.)

§ 4. It has already been remarked, that we have the same rights of war against the co-allies or associates of an enemy as against the principal belligerent. It must, however, be observed that general allies are not necessarily associates in a war. The allies of our enemy, therefore, may, or may not, themselves become our enemies, according to the character of the alliance which they have formed with that enemy, the time of making it, and the circumstances under which it was entered into. We must, therefore, distinguish between the general allies of an enemy, and his associates in a war. (*Hefstler, Droit International*, §§ 115–117; *Vattel, Droit des Gens*, liv. 3, ch. 6, § 95; *Bynkershoek, Quaest. Jur. Pub.*, lib. 1, cap. 9; *Wheaton, Elem. Int. Law*, pt. 8, ch. 2, §§ 13, 14; *Bello, Derecho Internacional*, pt. 2, cap. 9, § 1.)

§ 5. But the question here arises, how are we to know whether an enemy's ally is himself to be regarded as an enemy, and to be treated in the same manner as the principal belligerent? In the first place, if he has made common cause with our enemy in beginning or carrying on hostilities against us, we have toward him the same belligerent rights as toward the principle in the war, for both are equally our enemies. There is no need of proving him an enemy, for his own conduct has made him such. Again, even where there are no obligations of treaty, if he freely and voluntarily declares in favor of his ally and against us, he, of his own accord, becomes our enemy, and is to be treated in every respect as the principal. But the simple fact of there being an alliance between our enemy and other nations would not justify us in treating such nations as belligerents. (*Vattel, Droit des Gens*, liv. 3, ch. 6, §§ 96-98; *Wheaton, Elem. Int. Law*, pt. 3, ch. 2, § 14; *Bello, Derecho Internacional*, pt. 2, cap. 9, § 1; *Heffter, Droit International*, §§ 115-117.)

§ 6. Alliances, for warlike purposes, are divided into two classes, *offensive* and *defensive*. In the former, the state unites with its ally for the purpose of jointly waging war against a third party; but in the latter, the state engages to defend its ally in case of an attack. Some alliances are both offensive and defensive; others are only defensive; but there is seldom an offensive alliance which is not also a defensive one. Some are against all opponents, and without restriction; while others are only against a particular state, and on specified conditions, with limitations and exceptions. The character of such alliances is discussed elsewhere. We shall here consider their legal effects with respect to belligerent rights and not their moral character. Warlike alliances, made at the commencement of, or during a war, are necessarily binding, for the contracting parties then know the character of the war and the exact nature of the obligations which they have assumed. Alliances, made under such circumstances, are acts of hostility which make the ally an enemy equally with the principal belligerent. It is important, however, to satisfy ourselves as to the character of such alliances, to see whether or not they are really *warlike* compacts which make the contracting parties also parties to the war. The alliance

between France and the English revolted colonies in North America, being made during the war of the American revolution, was very properly regarded by Great Britain as tantamount to a declaration of war on the part of France, and as justifying immediate hostilities against this ally of the revolted colonies. (*Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 11; *Heffter, Droit International*, §§ 115–117; *Vattel, Droit des Gens*, liv. 3, ch. 6, §§ 80, 85; *Bynkershoek, Quaest. Jur. Pub.*, lib. 1, cap. 9; *Phillimore, On Int. Law*, vol. 3, § 78.)

§ 7. A warlike alliance made by a third party before the war with a state, then our friend, but now our enemy, will not, as a general rule, be, of itself, a sufficient cause for commencing hostilities against such third party; for there may be good reason why he should not regard himself as bound by the obligations of the alliance. It would certainly be very impolitic, as well as improper, for us to treat as a belligerent one who may not be disposed to become our enemy. The character of the alliance, and the peculiar circumstances of the case, must serve as guides for our conduct, always keeping in mind the maxim, that it is better to have a friend than an enemy, and the rule of international law, that we are justifiable in engaging in hostilities only so far as may be necessary for our own security and the protection of our just rights. In case of alliances, made before the war, the question is, to determine whether the actual circumstances are such as were contemplated in the engagement,—whether they are such as were expressly specified, or tacitly supposed, in the treaty. This is what the civilians call *casus foederis*, or the case of the alliance. Whatever has been promised, either expressly or tacitly, in the treaty, is due in the *casus foederis*. But if not so promised, it is not due. If the war is not such a case as the treaty contemplated, the ally does not become a party to it; for the *casus foederis* does not take place. (*Vattel, Droit des Gens*, liv. 3, ch. 6, § 88; *Wheaton, Elem. Int. Law*, pt. 3, ch. 2, § 15; *Grotius, de Jur. Bel. ac Pac.*, liv. 2, cap. 15, § 13; *Bynkershoek, Quest. Jur. Pub.*, lib. 1, cap. 9; *Martens, Precis du Droit des Gens*, § 299; *Moser, Versuch*, etc. b. 9, pt. 1, p. 24; *Garden, De Diplomatie*, liv. 7, § 1; *Heffter, Droit International*, § 115; *Riquelme, Derecho Pub. Int.*, b. 1, tit. 1, cap. 11.)

§ 8. In an *offensive* alliance, made before the war, the ally engages generally to coöperate in hostilities against a specified power, or against any power with whom the other party may declare war. Where an alliance is made in general terms, without any specified conditions, limitations, or exceptions, does the *casus foederis* take place the moment the other party declares war? In other words, does such an offensive alliance differ in its binding effect from one contracted with a party already engaged, or on the point of engaging, in a war, the character of which is already known? Vattel says: "As it is only for the support of a just war that we are allowed to give assistance or contract alliances, every alliance, every warlike association, every auxiliary treaty, contracted by way of anticipation in time of peace, and with no view to any particular war, necessarily and of itself includes this tacit clause, *that the treaty shall not be obligatory except in case of a just war*. On any other footing the alliance could not be validly contracted." Mr. Wheaton says: "To promise assistance in an unjust war, would be an obligation to commit an injustice, and no such contract is valid." It would seem to follow, from this fundamental principle, that where one of two parties to an offensive alliance, made before the war, declares war against its enemy, even though that enemy be the very nation against which the alliance was formed, the other ally is to be allowed time to examine into the causes of the war; if it be a just war, all his engagements come into force; but if it be unjustly declared, his treaty obligations cease to be binding. (*Vattel, Droit des Gens*, liv. 3, ch. 6, § 88; *Wheaton, Elem. Int. Law*, pt. 3, ch. 2, § 15; *Garden, De Diplomatie*, liv. 6, sec. 2, § 2; *Bello, Denecho, Internacional*, pt. 2, ch. 9, § 1.)

§ 9. So, also, in a *defensive* alliance made before the war, the *casus foederis* does not take place immediately on one of the parties being attacked by an enemy. The other contracting party has the right, as indeed it is his duty, to ascertain if his ally has not given the enemy just cause of war, for no one is bound to undertake the defense of an ally, in order to enable him to insult others, or to refuse them justice. If he is manifestly in the wrong, his co-ally may require him to offer reasonable satisfaction; and if the enemy refuse to accept it,

and insists upon a continuance of the war, the co-ally is then bound to assist in his defense. But without such offer of reasonable satisfaction, the war continues to be aggressive in character, and therefore unjust, and the ally may properly refuse to render the promised assistance, for the tacit condition on which such assistance was stipulated to be given, has not been observed, or, in other words, the *casus foederis* has not taken place. (*Vattel, Droit des Gens*, liv. 2, ch. 10, § 90; *Wheaton, Elem. Int. Law*, pt. 3, ch. 2, § 15; *Bello, Derecho Internacional*, pt. 2, ch. 9, § 1; *Wildman Int. Law*, vol. 2, p. 166; *Garden, De Diplomatie*, liv. 6, sec. 2, § 2.)

§ 10. If, on the contrary, a party to the defensive alliance, could call upon his ally to assist him whenever he was assailed, and without regard to the justice of the war, or the circumstances of the attack, there would be no difference between a defensive and an offensive alliance, for, as stated in the chapter on different kinds of war, many wars which are defensive in their operations are essentially offensive in their character and principles. In the words of Wheaton, "where attack is the best mode of providing for the defense of a state, the war is defensive in principle, though the operations are offensive. Where the war is unnecessary to safety, its offensive character is not altered, because the wrong-doer is reduced to defensive warfare. So, a state, against which a dangerous wrong is manifestly meditated, may prevent it by striking the first blow, without thereby waging a war in its principle offensive. Accordingly, it is not every attack made on a state that will entitle it to aid under a defensive alliance; for if that state had given just cause of war to the invader, the war would not be, on its part, defensive in principle." (*Vattel, Droit des Gens*, liv. 2, ch. 16, §§ 245–261; *Wheaton, Elem. Int. Law*, pt. 3, ch. 2, § 15; *Wildman, Int. Law*, vol. 2, p. 166; *Grotius, de Jur. Bel. ac Pac.*, lib. 2, cap. 15, § 13; *Bynkershoek, Quest. Jur. Pub.*, lib. 1, cap. 9; *Garden, De Diplomatie*, liv. 6, sec. 2, § 2; *Burlamaqui, Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 8.)

§ 11. Admitting the principle laid down by Vattel, that every treaty of alliance contains the tacit clause that it shall not be binding, except in case of a just war, and that the co-ally has a right to decide for himself upon the character of the war, and whether or not the *casus foederis* has taken

place, it is only in case the war is *clearly* and *obviously* unjust that he can claim a release from the obligations which he voluntarily contracted. Whether the alliance be offensive or defensive, or both, if there be strong reasons to doubt the justice of the war, the ally is to be allowed time to examine it before he can be required to render the stipulated assistance; but, unless upon such examination, he find it *manifestly* unjust, he must comply with his engagements. Under ordinary circumstances, and in the absence of any proof to the contrary, he is bound to consider that his co-ally has just cause of war. In speaking of the tacit restriction, which Vattel says is necessarily understood in every treaty of alliance, Mr. Wheaton remarks that it "can be applied only to a manifest case of unjust aggression on the part of the other contracting party, and cannot be used as a pretext to elude the performance of a positive and unequivocal engagement, without justly exposing the ally to the imputation of bad faith. In doubtful cases, the presumption ought rather to be in favor of our confederate, and of the justice of his quarrel." (*Vattel, Droit des Gens*, liv. 3, ch. 6, §§79-82; *Wheaton, Elem. Int. Law*, pt. 3, ch. 2, § 15; *Bynkershoek, Quaest. Jur. Pub.*, lib. 1, cap. 9; *Bello, Derecho Internacional*, pt. 2, cap. 9, § 1.)

§ 12. We have already pointed out the distinction between treaties of alliance and treaties of limited succor and subsidy. In a treaty of succor, the ally stipulates to furnish certain assistance in troops, ships of war, provisions, or money. If the succor is to consist of troops, they are called *auxillaries*; if of money, it is called *subsidy*. The rules already laid down, with respect to the *casus foederis* in treaties of alliance made before the war, apply equally to treaties of limited succor and subsidy. For the reasons there given, such treaties are not binding where the war is manifestly unjust. (*Vattel, Droit des Gens*, liv. 3, ch. 6, § 92; *Wheaton, Elem. Int. Law*, pt. 3, ch. 2, § 15; *Bello, Derecho Internacional*, pt. 2, ch. 9, § 1.)

§ 13. Again, Vattel says that if the state which has promised succor finds itself unable to furnish it, this inability alone, is sufficient to dispense with the obligation. If, for example, one of the allies is engaged in another war, not contemplated by the alliance, and which requires his whole strength, he is absolved from sending assistance to his ally

in the war to which he is not yet a party. Again, if he has promised provisions, and his own subjects are suffering from famine, the *casus foederis* does not take effect; for he is not obliged to give another what is absolutely necessary for the use of his own people. It seems to us that a promise is none the less binding because of the inability of the promisor to fulfil his engagements. (*Vattel, Droit des Gens*, liv. 3, ch. 6, § 92; *Wheaton, Elem. Int. Law*, pt. 3, ch. 2, §§ 14, 15; *De Felice, Droit de la Nat. et des Gens*, tome 2, lec. 28.)

§ 14. It is also proper to remark that even where the *casus foederis* is admitted to take place, and the stipulated succors are furnished, the ally who furnishes them is not necessarily made a party to the war. "Where one state," says Wheaton, "stipulates to furnish to another a limited succor of troops, ships of war, money, or provisions, without any promise looking to an eventual engagement in general hostilities, such a treaty does not necessarily render the party furnishing this limited succor the enemy of the opposite belligerent. It only becomes such, so far as respects the auxilliary forces thus supplied; in all other respects it remains neutral. Such, for example, have long been the accustomed relations of the confederated cantons of Switzerland with the other European powers." (*Wheaton, Elem. Int. Law*, pt. 3, ch. 2, § 14; *Vattel, Droit des Gens*, liv. 3, ch. 6 §§ 81, 82; *Ward, Law of Nations*, vol. 2, p. 265; *Martens, Precis des Droit des Gens*, §§ 301, 302; *Garden, De Diplomatie*, liv. 6, sec. 2, §§ 2-5; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 12; *Bello, Derecho Internacional*, pt. 2, cap. 9, § 1.)

§ 15. A distinction, however, must be made between simple treaties of succor and subsidy, and capitulations for mercenaries, like those formerly entered into by the Swiss. Auxilliary troops are usually under the general control and direction of the power which furnishes them, and which is, therefore, in a measure, responsible for their acts. But mercenaries, furnished under capitulations, usually engage in a foreign service for a stated period, and for stipulated pay and allowances, being entirely at the disposition of the power which employs them, that which furnishes them having no part in the conquests which are made, or in the negotiations



and treaties which are entered into. (*Martens, Precis du Droit des Gens*, §§ 301–303; *Galiani, Dei Doneri dei Prin.*, etc., lib. 1, cap. 5, p. 145; *Moser, Versuch*, etc., b. 10, pt. 1, pp. 189, 140; *Romainmatier, Histoire Militaire des Suisse*, passim; *Garden, De Diplomatie*, liv. 6, sec. 2, § 2.)

§ 16. Vattel discusses the question, whether the limited assistance rendered to the enemy, under the obligations of a subsidy-treaty, is a just cause of war. If the ally of our enemy, he says, goes no further than to furnish the stipulated succor, and, in other respects, preserves toward us the accustomed relations of friendship and neutrality, we may overlook this cause of complaint. This prudent caution of avoiding an open rupture with those who render to our enemy certain limited assistance, previously stipulated for, has gradually introduced the custom of not regarding it as an act of hostility, especially where it is of a limited character. But, if prudence dissuades us from making use of a right, it does not thereby destroy the right itself. A cautious belligerent may choose to overlook certain offences, rather than unnecessarily increase the number of its enemies, and be influenced by considerations of expediency, in not enforcing the strict rights of war. It is, therefore, a question of policy, whether the assistance furnished an enemy shall be regarded as good and sufficient cause for declaring war against the ally who furnishes it. (*Vattel, Droit des Gens*, liv. 3, ch. 6, §§ 79–82; *Wheaton, Elem. Int. Law*, pt. 3, ch. 2, § 14; *Ward, Law of Nations*, vol. 2, p. 295; *Heffler, Droit International*, §§ 115–117.)

§ 17. We have described, in another chapter, the general character of treaties of guarantee and surety, as distinguished from ordinary treaties of alliance. The question to be considered here, is, how far such treaties bind the party making the guarantee to assist the other party in a war for the defense or the security of the thing guaranteed? For example, Great Britain, by the treaties of 1642, 1654, 1661, 1703, 1807, 1810, and 1815, with Portugal, guaranteed the latter kingdom to the lawful heir of the house of Braganza, and agreed to defend it “against every hostile attack.” In the case of a war between Portugal and a third power, in which the former was subjected to “a hostile attack,” was Great Britain bound

to join in the war, without regard to its justice or injustice? Some publicists have laid down the general rule, that where one of the allies has guaranteed to the other certain specified rights or possessions, which are taken away or seized by a third power, this third power places itself in a position of hostility toward both of the contracting parties. In this case, it is said, the guaranteeing party cannot refuse to succor his ally. Here his duty is plain and indisputable, and if he should refuse to take part in the war, he is justly chargeable with a breach of the alliance. The *casus foederis* takes place, it is said, as soon as the rights or possessions so guaranteed are seized or encroched upon. The agreement, being for the security of a specific right, or the possession of a particular territory, it is special, and the covenant cannot be evaded or avoided by any general plea of the injustice of the war. Others say that treaties of guarantee are of the nature of a defensive alliance; and, consequently, that even where territories are guaranteed, the guarantee does not extend to wars provoked by the aggression of the party guaranteed. If, therefore, the war be manifestly unjust on the part of the ally so guaranteed, the *casus foederis* does not take place, and the stipulation is not binding. This view is consonant with general principles; for if the war be morally wrong on the part of one ally, he cannot reasonably demand the auxilliary strength of his co-ally to assist him in its prosecution. Again, in the case of the guarantee of a treaty, it is said that the guarantee is not only not obliged, but is not even authorized to interfere to compel its performance, unless required to do so by a party guaranteed, because the contracting parties are at liberty to vary its stipulations, or dispense altogether with their performance. It follows, therefore, that a party to a treaty of guarantee is not necessarily a party to a war undertaken by his co-ally, even though it be in defense of the thing guaranteed. (*Vattel, Droit des Gens*, liv. 3, ch. 6, § 91; *Wheaton, Elem. Int. Law*, pt. 3, ch. 2, §§ 14, 15, *Garden, De Diplomatie*, liv. 6, sec. 2, § 1; *Bello, Derecho Internacional*, pt. 2, cap. 9, § 1; *Heffter, Droit International*, §§ 115–117; *Wildman, Int. Law*, vol. 2, p. 169.)

§ 18. Conflicts not unfrequently occur in warlike alliances. In the case of an alliance for war, made toward and against

all, *with the reservation of allies*, this exception is to be understood to include *present* allies only, and not to extend to any subsequent treaty stipulations with other powers. Vattel supposes this case: "Three powers have entered into a treaty of defensive alliance; two of them quarrel and make war on each other; what shall the third do? The treaty does not bind it to assist either the one or the other. For it would be absurd to say that it was promised assistance to each against the other, or to one of the two to the prejudice of the other. All that is incumbent on it, is, to employ its good offices for reconciling its allies; and if such mediation fail, it remains free to assist the one which shall appear to have justice on its side." The latter part of this quotation should, perhaps, be adopted only with certain restrictions. If the alliances are such as to leave the third party in the position of a neutral, and exempt him from all obligations to assist either party, he cannot be considered at liberty to assist the one whose cause he may deem just. This fact alone would not constitute a justifiable cause of war. Moreover, as a neutral he is bound to treat both the belligerents as having justice on their side. What Vattel probably means to say is, that the third party is at liberty, *so far as his alliances are concerned*, to side with the belligerent whose cause he deems just. (Vattel, *Droit des Gens*, liv. 3, ch. 6, § 68; *Bynkershøek*, *Quæst. Jur. Pub.*, lib. 1, cap. 9; *Bello*, *Derecho Internacional*, pt. 2, ch. 9, § 1; *De Felice*, *Droit de la Nat. et des Gens*, tome 2, lec. 28.)

§ 19. A warlike association is where the alliance is of such an intimate and perfect character as to form a union of interests; where each of the parties is bound to act with his whole force, and all are alike principals in the war at its commencement, or become so during its progress. "Every associate of my enemy," says Vattel, "is indeed himself my enemy; it matters little whether any one makes war on me directly, and in his own name, or under the auspices of another; the same rights which war gives me against my principal enemy, it also gives me against all his associates. This results directly from my right of security and of self-defense, for I am equally attacked by the one and the other. But the question is, to know who are lawfully to be

accounted my enemy's associates, united against me in a war?" (*Vattel, Droit des Gens*, liv. 3, ch. 6, § 95; *Wolfius, Jus. Gentium*, §§ 730–736; *Martens, Precis du Droit des Gens*, § 300; *Garden, De Diplomatie*, liv. 6, sec. 2, § 3; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 12.)

§ 20. Vattel discusses at some length the question, who are, and who are not to be regarded as such associates in the war? and makes the following distinctions. He regards as associates, *first*, those who make common cause with the enemy, although not appearing as principals; *second*, those who assist the enemy without being bound to do so by any treaty; *third*, those who, under the obligations of an offensive alliance, assist the principal in carrying on the war; *fourth*, those who make defensive alliance with the enemy after the commencement of the war, or on the certain prospect of its declaration, or with special reference to the defense of the enemy against the actual opposing belligerent; and *fifth*, those who have formed with the enemy, even before hostilities have commenced, a real league or society of war. All such are associates in the war. But if the defensive alliance is general in its character, leaving it doubtful when the *casus foederis* will take place, or if it has not been made particularly against me, nor concluded at a time when I was openly preparing for war or had already begun it, or if the allies have only stipulated in it, that each of them shall furnish a stated succor to him who shall be first attacked, such allies are not necessarily associates in the war. If auxillaries are furnished to my enemy, they are enemies, but the nation that furnishes them are not such of necessity. By attacking such nations for that reason, says Vattel, "I should increase the number of my enemies, and instead of a slender succor which they furnished against me, should draw on myself the united force of those nations." (*Vattel, Droit des Gens*, liv. 3, ch. 6, §§ 95–98; *Wheaton, Elem. Int. Law*, pt. 2, ch. 2, § 15; *Bynkershoek, Quaest. Jur. Pub.*, lib. 1, cap. 9; *Bello, Derecho Internacional*, pt. 2, ch. 9, § 1.)

§ 21. As a general rule, it is not necessary to make a formal declaration of war against the associates of the enemy before treating them as belligerents. The nature of their

obligations, or the character of their acts, makes them public enemies, and puts them in the same position toward us as if they were principals in the war. Our belligerent rights against them commence, in some cases, with the war, and, in others, with their first act of hostility against us. The existence of the alliance, with the acknowledgement of its obligation, and a preparation for carrying on the war, would make them public enemies, even before they actually take part in the military operations, as was the case between France and Great Britain in 1778. (*Vattel, Droit des Gens*, liv. 3, ch. 6, § 102; *Bynkershoek, Quaest. Jur. Pub.*, lib. 1, cap. 9; *Wheaton, Elem. Int. Law*, pt. 3, ch. 2, § 15; *Phillimore, On Int. Law*, vol. 3, § 60; *Heffter, Droit International*, § 120.)

§ 22. But, in modern times, there are very few alliances between states which so bind them together as necessarily to make them associates in a war; it is, therefore, in general, a matter of prudence to seek to disarm the enemy's allies by treating them as friends. It is a cheap and honorable means of weakening an opponent's power, and may save the effusion of much innocent blood. The contrary course is not only impolitic on our part, but tends to prolong the war by making it more general, and by involving new elements of discord, and more complicated and conflicting interests. Neutrality may be *absolute* or *qualified*; *absolute* when the neutral is bound to neither belligerent by a treaty which may affect the other, and *qualified*, when the execution of a treaty with one would affect the other. The relation of the United States to France and Great Britain, at the beginning of the war of 1793, is an example of such qualified neutrality. There is an obvious difference between an alliance and such neutrality, although it is sometimes difficult to draw the line of separation. This subject will be considered in another chapter. (*Vattel, Droit des Gens*, liv. 3, ch. 6, §§ 95-102; *Wheaton, Elem. Int. Law*, pt. 3, ch. 2, § 15.)

## CHAPTER XVIII.

### RIGHTS OF WAR AS TO ENEMY'S PERSON.

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§ 1. It has already been shown that war places all the subjects of one belligerent state in a hostile attitude toward all the subjects of the other belligerent; and although, in order to justify us at the tribunal of conscience and in the estimation of the world, it is necessary that we should have just cause of war, and justifiable reasons for undertaking it; yet, as the justness or unjustness of a war is usually a matter of controversy between the contending parties, and not always easy to be determined it has become an established principle,

of international jurisprudence that a war in form shall, in its legal effects, be considered as just on both sides, and that whatever is permitted to one of the belligerents, shall also be permitted to the other. The law of nations makes no distinction, in this respect, between a just and an unjust war, both of the belligerent parties being entitled to all the rights of war as against the other, and with respect to neutrals. Each party may employ force, not only to resist the violence of the other, but also to secure the objects for which the war is undertaken. The first and most important of these rights, which the state of war has conferred upon the belligerents, is that of taking human life. This right, in its full extent, authorizes the individuals of the one party to kill and destroy those of the other, whenever milder means are insufficient to conquer them or bring them to terms. (*Hautefeuille, Des Nations, Neutres*, tit. 7, ch. 1; *Bello, Derecho Internacional*, pt. 2, cap. 3, § 1; *Vattel, Droit des Gens*, liv. 3, ch. 8, §§ 136, 137, 138; *Burlamaqui, Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 6; *Wheaton, Elem. Int. Law*, pt. 4, ch. 2, § 1; *Phillimore, On Int. Law*, vol. 3, § 50; *Garden, De Diplomatie*, liv. 6, § 8; *Heffler, Droit International*, § 122; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 10.)

§ 2. But this extreme right of war, with respect to the enemy's person, has been modified and limited by the usages and practices of modern warfare. Thus, while we may lawfully kill those who are actually in arms and continue to resist, we may not take the lives of those who are not in arms, or who, being in arms, cease their resistance and surrender themselves into our power. The just ends of the war may be attained by making them our prisoners, or by compelling them to give security for their future conduct. Force and severity can be used only so far as may be necessary to accomplish the objects for which the war was declared. (*Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 10; *Heffler, Droit International*, §§ 126, 127; *Wildman, Int. Law*, vol. 2, p. 26; *Vattel, Droit des Gens*, liv. 3, ch. 8, §§ 139, 140; *Wheaton, Elem. Int. Law*, pt. 4, ch. 2, § 2; *Phillimore, On Int. Law*, vol. 3, §§ 91, 95; *Bello, Derecho Int.*, pt. 2, cap. 3, §§ 3, 4; *Bodinius, De Republica*, lib. 1, p. 34; *Manning, Law of Nations*, p. 149.)

§ 3. There are certain persons in every state who, as already stated, are exempt from the direct operations of war. Feeble old men, women, and children, and sick persons, come under the general description of enemies, and we have certain rights over them as members of the community with which we are at war; but, as they are enemies who make no resistance, we have no right to maltreat their persons, or to use any violence toward them, much less to take their lives. This, says Vattel, is so plain a maxim of justice and humanity, that, every nation in the least degree civilized, acquiesces in it. And modern practice has applied the same rule to ministers of religion, to men of science and letters, to professional men, artists, merchants, mechanics, agriculturists, laborers,—in fine, to all non-combatants, or persons who take no part in the war, and make no resistance to our arms. It was the received opinion in ancient Rome, in the times of Cato, and Cicero, that one who was not regularly enrolled as a soldier, could not lawfully kill an enemy. But afterward in Italy, and more particularly during the lawless confusion of the feudal ages, hostilities were carried on by all classes of persons, and every one capable of being a soldier was regarded as such, and all the rights of war attached to his person. But as wars are now carried on by regular troops, or, at least, by forces regularly organized, the peasants, merchants, manufacturers, agriculturists, and, generally, all public and private persons, who are engaged in the ordinary pursuits of life, and take no part in military operations, have nothing to fear from the sword of the enemy. So long as they refrain from all hostilities, pay the military contributions which may be imposed on them, and quietly submit to the authority of the belligerent who may happen to be in the military possession of their country, they are allowed to continue in the enjoyment of their property, and in the pursuit of their ordinary avocations. This system has greatly mitigated the evils of war, and if the general, in military occupation of hostile territory, keeps his soldiery in proper discipline, and protects the country-people in their labors, allowing them to come freely to his camp to sell their provisions, he usually has no difficulty in procuring subsistence for his army, and avoids many of the dangers incident to a position



in a hostile territory. (*Kent, Com. on Am. Law*, vol. 1, p. 94; *Cicero, de Off.*, lib. 1, cap. 11; *Grotius, de Jur. Bel. ac. Pac.*, lib. 3, cap. 9, § 2; *Barlamaqui, Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 6; *Vattel, Droit des Gens*, liv. 3, ch. 8, §§ 145–147; *Bynkershoek, Quaest Jur. Pub.*, lib. 1, cap. 8; *Wheaton, Elem. Int. Law*, pt. 4, ch. 2, §§ 2, 4; *Rutherford, Institutes*, b. 2, ch. 9, § 15; *Phillimore, On Int. Law*, vol. 3, § 94; *Wildman, Int. Law*, vol. 2, p. 26; *Polson, Law of Nations*, sec. 6; *Manning, Law of Nations*, pp. 144–153; *Martens, Precis du Droit des Gens*, § 277; *Garden, de Diplomatie*, liv. 6, § 8; *Heffter, Droit International*, § 126; *Klüber, Droit des Gens*, § 247.)

§ 4. But this exemption of the enemy's persons from the extreme rights of war, is strictly confined to non-combatants, or such as refrain from all acts of hostility. If the peasantry and common people of a country use force, or commit acts in violation of the milder rules of modern warfare, they subject themselves to the common fate of military men, and sometimes to a still harsher treatment. And if ministers of religion and females, so far forget their profession and sex, as to take up arms, or to incite others to do so, they are no longer exempted from the rights of war, although always within the rules of humanity, honor and chivalry. And even if a portion of the non-combatant inhabitants of a particular place become active participants in the hostile operations, the entire community are sometimes subjected to the more rigid rules of war. (*Bello, Derecho Int.*, pt. 2, cap. 8, § 4; *Vattel, Droit des Gens*, liv. 3, ch. 8, §§ 146, 147; *Burlamaqui, Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 6; *Garden, De Diplomatie*, liv. 6, § 8.)

§ 5. Moreover, in some cases, even where no opposition is made by the non-combatant inhabitants of a particular place, the exemption properly extends no further than to the sparing of their lives; for, if the commander of the belligerent forces has good reason to mistrust the inhabitants of any place, he has a right to disarm them, and to require security for their good conduct. He may lawfully retain them as prisoners, either with a view to prevent them from taking up arms, or for the purpose of weakening the enemy. Even

women and children may be held in confinement, if circumstances render such a measure necessary, in order to secure the just objects of the war. But if the general, without reason, and from mere caprice, refuses women and children their liberty, he will be taxed with harshness and brutality, and will be justly censured for not conforming to a custom established by humanity. When, however, he has good and sufficient reasons for disregarding, in this particular, the rules of politeness and the suggestions of pity, he may do so without being justly accused of violating the laws of war. The presumption, however, is against him, and, if he wishes to preserve a fair fame, he must give good and satisfactory reasons for conduct so unusual. (*Vattel, Droit des Gens*, liv. 3, ch. 8, §§ 147, 148; *Bynkershoek, Quaest. Jur. Pub.*, lib. 1, cap. 3; *Grotius, de Jur. Bel. ac Pac.*, lib. 3, cap. 11, §§ 8–12; *Phillimore, On Int. Law*, vol. 3, §§ 94, 95; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 10; *Bello, Derecho Internacional*, pt. 2, cap. 3, § 4.)

§ 6. As the right to kill an enemy, in war, is applicable only to such public enemies as make forcible resistance, this right necessarily ceases so soon as the enemy lays down his arms and surrenders his person. After such surrender, the opposing belligerent has no power over his life, unless new rights are given by some new attempt at resistance. "It was a dreadful error of antiquity," says Vattel, "a most unjust and savage claim, to assume a right of putting a prisoner of war to death, and even by the hand of the executioner." By the present rules of international law, quarter can be refused the enemy only in cases where those asking it have forfeited their lives by some crime against the conqueror, under the laws and usages of war. (*Kent, Com. on Am. Law*, vol. 1, p. 90; *Rayneval, Inst. du Droit Nat.*, etc., liv. 3, ch. 5; *Montesquieu, l'Esprit des Loix*, liv. 15, ch. 2; *Grotius, de Jur. Bel. ac Pac.*, liv. 3, cap. 11, §§ 13–15; *Burlamaqui, Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 6; *Vattel, Droit des Gens*, liv. 3, ch. 8, § 149; *Heffter, Droit International*, § 126; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 12; *Bello, Derecho Internacional*, pt. 2, cap. 3, §§ 3, 5; *Real, Science du Gouvernement*, tome 5, ch. 2, sec. 6; *Scott, General Orders*, No. 372, Dec. 12th, 1847.)

§ 7. According to the laws of war, as practiced by some of the nations of antiquity, and by savage and barbarous nations of the present time, prisoners of war might be put to death, or sold into slavery. But, in the present age, no nation claiming a semi-civilization, makes slaves of prisoners of war, or claims the general right to put them to death, although such a right is sometimes exercised "in those extreme cases where resistance on their part, or the part of others who come to their rescue, renders it impossible to keep them. Both reason and general opinion concur in showing that nothing but the strongest necessity will justify such an act." Although, by the milder rules of modern warfare, prisoners of war cannot be treated harshly, the captor may, nevertheless, take all proper measures for their security, and, if there be reason to apprehend that they will rise on their captors, or make their escape, he may put them in confinement and even fetter them. But such extreme measures should never be resorted to, except in cases of absolute necessity. Self-security is the first law of the conqueror, and the laws of war justify the use of means necessary to that end, but beyond that, no harshness or severity is allowable. Each particular case, as it arises, must be judged by the attending circumstances, the means employed, and the danger they were designed to guard against. The responsibility of a commanding officer is always very great, and his conduct should not be hastily condemned, as it may be induced by circumstances not generally known, or easily explained. Too much leniency is often as fatal to his plans as an unjust severity to his reputation for humanity. He should be judged by his general course and character, rather than by a single act, the motives of which are so easily misunderstood, and so often misconstrued. (*Wheaton, Elem. Int. Law*, pt. 4, ch. 2, § 2; *Vattel, Droit des Gens*, liv. 3, ch. 8, §§ 149, 150, 152; *Rutherford, Institutes*, b. 2, ch. 9, § 15; *Burlamaqui, Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 6; *Grotius, de Jur. Bel. ac Pac.*, lib. 3, cap. 14, §§ 1, et seq.; *Phillimore, on Int. Law*, vol. 3, § 95; *Wildman, Int. Law*, vol. 2, p. 26; *Manning, Law of Nations*, pp. 149-162; *Martens, Princes du Droit des Gens*, § 275; *Garden, de Diplomatie*, liv. 6, § 9; *Rayneval, Inst. du Droit Nat., etc.*, liv. 3, ch. 5; *De Felice, Droit de la Nat., etc.*, tome 2, lec. 25; *Heffter, Droit Interna-*

*cional.* § 129; *Bello, Derecho Internacional*, pt. 2, cap. 3, § 5; *Real, Science du Gouvernement*, tome 5, ch. 2, sec. 8; *De Cussy, Droit Maritime*, liv. 1, tit. 3, § 32.)

§ 8. The ancient practice, of putting prisoners of war to death, or selling them into slavery, gradually gave way to that of *ransoming*, which continued through the feudal wars of the middle ages. By a cartel of March 12th, 1780, between France and England, the ransom in the case of a field-marshal of France, or an English field-marshal, or captain-general, was fixed at sixty pounds sterling. And even as late as the treaty of Amiens, in 1802, between Great Britain and the French and Batavian republics, it was deemed necessary to stipulate that the prisoners on both sides should be restored *without ransom*. The present usage, of exchanging prisoners without any ransom, was early introduced among the more polished nations, and was pretty firmly established in Europe before the end of the seventeenth century. (*Vattel, Droit des Gens*, liv. 3, ch. 8, § 153; *Wheaton, Elem. Int. Law*, pt. 4, ch. 2, § 3; *Wheaton, Hist. Law of Nations*, pp. 162–164; *Burlamaqui, Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 6; *Phillimore, On Int. Law*, vol. 3, § 95; *De Felice, Droit de la Nat., etc.*, tome 2, lec. 25; *Heffler, Droit International*, §§ 126–129; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 12; *Bello, Derecho Internacional*, pt. 2, cap. 3, § 5; *Real, Science du Gouvernement*, tome 5, ch. 2, sec. 8; *De Cussy, Droit Maritime*, liv. 1, tit. 3, § 32.)

§ 9. But this usage is not, even now, considered obligatory upon those who do not choose to enter into a cartel for that purpose. “Whoever makes a just war,” says Vattel, “has a right, if he thinks proper, to detain his prisoners till the end of the war.” \* \* \* “If a nation finds a considerable advantage in leaving its soldiers prisoners with the enemy during the war, rather than exchange them, it may certainly, unless bound by cartel, act as is most agreeable to its interests. This would be the case of a state abounding in men, and at war with a nation more formidable by the courage than the number of its soldiers. It would have been of little advantage to the czar, Peter the Great, to restore the Swedes, his prisoners, for an equal number of ‘Russians.’ In 1810, Great Britain had, confined in prisons,

hulks, and guard-ships, about fifty thousand French prisoners of war, while Napoleon had a much less number of English, but probably enough Spanish and Portuguese prisoners (allies of England) to more than make up the equality of numbers. He offered to exchange the whole against the whole, or one thousand English and two thousand Spanish and Portuguese for three thousand French. But the British negotiators at first insisted upon the exchange being confined to French and English; they, however, afterward consented to a general exchange, beginning with the English for an equal number of Frenchmen. Napoleon would not agree to this, because, he said, as soon as the English got back their own countrymen, they would find some excuse for not carrying the exchange further, and retain the remainder of the French in the hulks forever. The negotiations were, therefore, broken off. That both parties had a legal right to decline the exchange cannot be denied; and the subsequent attempts of each to cast odium upon the other for refusing its own proposition, was unbecoming the character of two great nations. Napoleon's proposition was in accordance with the usages of war in such cases, and not unreasonable in itself; moreover, by the same code England was bound to provide for the exchange of her allies who had been made prisoners in the common cause. But if she believed that she would, by the proposed arrangement, lose more than she gained in relative power, she had an undoubted right to decline its acceptance. And certainly Napoleon had good reasons for declining the arrangement proposed to him by Great Britain. (*Vattel, Droit des Gens*, liv. 3, ch. 8, § 153; *Las Casas, Memoires de St. Helena*, tome 7, pp. 39, 40; *Alison, Hist. of Europe*, vol. 3, pp. 394, 395; *Hardenberg, Memoires d'un Homme d'Etat*, tome 2, pp. 438-484; *Napoleon, Memoires*, vol. 9, p. 61; *Annual Register*, British, 1811, p. 76; *Parliamentary Debates*, vol. 20, pp. 623-691.)

§ 10. But while no state is obliged, by the positive rules of international law, to enter into a cartel for the exchange of prisoners of war, there is a strong moral duty imposed upon the government of every state to provide for the release of such of its citizens and allies, as have fallen into the hands of the enemy. They have fallen into this misfortune only

by acting in its service, and in the support of its cause. "This," says Vattel, "is a care which the state owes to those who have exposed themselves in her defense." (*Vattel, Droit des Gens*, liv. 3, ch. 8, § 154; *Wheaton, Elem. Int. Law*, pt. 4, ch. 2, § 3; *Grotius, de Jur. Bel. ac Pac.*, lib. 3, cap. 7, §§ 8, 9; *Wheaton, Hist. Law of Nations*, pp. 162–164; *Phillimore, On Int. Law*, vol. 3, § 95; *Martens, Precis du Droit des Gens*, § 275; *Polson, Law of Nations*, lec. 6; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 12.)

§ 11. Sometimes, prisoners of war are permitted to resume their liberty, upon the condition that they will not again take up arms against their captors, either for a limited time, or during the continuance of the war, or until duly exchanged. Officers are very frequently released upon their *parole*, subject to the same conditions. Such agreements made by officers for themselves, or by a commander for his troops, are valid, and cannot be annulled by the state to which they belong. Agreements of this kind come within the necessary limits of the implied powers of the commander, and are obligatory upon the state. "Good faith and humanity," says Wheaton, "ought to preside over the execution of these compacts, which are designed to mitigate the evils of war, without defeating its legitimate purposes." (*Grotius, De Jur. Bel. ac Pac.*, lib. 3, cap. 23, §§ 6–10; *Vattel, Droit des Gens*, liv. 3, ch. 8, § 151; *Wheaton, Elem. Int. Law*, pt. 4, ch. 2, § 3; *Phillimore, On Int. Law*, vol. 3, § 95; *Polson, Law of Nations*, sec. 6; *Wildman, Int. Law*, vol. 2, p. 26; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 12; *Bello, Derecho Internacional*, pt. 2, cap. 3, § 5; *Real, Science du Gouvernement*, tome 5, ch. 2, sec. 8; *De Cussy, Droit Maritime*, liv. 1, tit. 3, § 32.)

§ 12. It will be shown hereafter that there are certain limits to the conditions which the captor may impose on the release of prisoners of war, and to the stipulations which an officer is authorized to enter into, either for himself or for his troops. The captor may impose the condition that the prisoners shall not take up arms against him, either for a limited period or during the war; but he cannot require them to renounce forever the right to bear arms against him; nor can they, on their part, enter into any engagements

inconsistent with their character and duties as citizens and subjects. Such engagements made by them would not be binding upon their sovereign or state. The reason of this limitation is obvious: the captor has the absolute right to keep his prisoners in confinement till the termination of the war; but on the conclusion of peace he would no longer have any reasons for detaining them. They, therefore, have the right to stipulate for their conduct during that period, but not beyond the time when they would have been released had no agreement been entered into. Nor can the captor generally impose conditions which extend beyond the period when the prisoners would necessarily be entitled to their liberty. Beyond this, their services are due to, and at the disposition of, the state to which they owe allegiance, and they have no right to limit them by contracts with a foreign power. (*Phillimore, On Int. Law*, vol. 3, § 95; *Vattel, Droit des Gens*, liv. 3, ch. 16, § 237; *Riquelme, Derecho, Pub. Int.*, lib. 1, tit. 1, cap. 12; *Bello, Derecho Internacional*, pt. 2, cap. 3, § 5; *De Cussy, Droit Maritime*, liv. 1, tit. 3, § 82.)

§ 13. By the modern usage of nations, commissaries are permitted to reside in the respective belligerent countries, for the purpose of negotiating and carrying into effect the necessary arrangements for the support, as well as the release and exchange of prisoners of war. But difficulties sometimes occur in arranging the terms of such agreements, and it not unfrequently happens that a considerable length of time will elapse after their capture before they can be exchanged or released. Moreover, by the conditions of their *parole*, they are sometimes required to remain in the captor's country for a fixed term after their release. During these periods they must be subsisted either by the captor or by their own government, and it sometimes becomes a question to which this duty properly belongs. (*Wheaton, Elem. Int. Law*, pt. 4, ch. 2, § 8; *Phillimore, On Int. Law*, vol. 3, § 95; *Martens, Precis du Droit des Gens*, § 275; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 12; *Bello, Derecho Internacional*, tit. 2, cap. 3, § 5.)

§ 14. Vattel places the duty of a state to support its subjects, while prisoners in the hands of an enemy, upon the same grounds as its duty to provide for their ransom and

release. Indeed, a neglect, or refusal, to do so, would seem to be even more criminal than a neglect, or refusal, to provide for their exchange; for the exigencies of the war may make it the temporary policy of the state, to decline an exchange, but nothing can excuse it in leaving its subjects to suffer in an enemy's country, without any fault of their own, when the state has the means of relieving them from the misfortune in which they are involved, by acting in its service and by supporting its cause. It follows, therefore, that although a state may properly, under certain circumstances, refuse to exchange its prisoners, it cannot, without a violation of moral duty, neglect to make the proper and necessary arrangement for their support while they are thus retained, by a captor who is willing to exchange them. It is stated by English writers, that, in the wars of Napoleon, the British authorities regularly remitted the whole cost of the support of English prisoners, in France, to the French government, but that the latter failed to make any provision whatever for the support of its subjects, in the hands of the English, leaving them to starvation, or the charity of their enemies. If this be true, it is a blot upon the character of the French government. (*Vattel, Droit des Gens*, liv. 3, ch. 8, § 154; *Alison, Hist. of Europe*, vol. 3, pp. 394, 395; *Hansard, Parl. Debates*, vol. 20, pp. 634, 694; *Hardenburg, Memoirs d'un homme d'Etat*, tome 2, p. 438; tome 9, p. 105; *De Cussy, Droit Maritime*, liv. 1, tit. 3, § 32; *Las Casas, Memoires de St. Helena*, tome 7, pp. 39, 40; *Annual Register*, 1811, p. 76.)

§ 15. It not unfrequently happens in a war, that, although both parties are willing to make an exchange of prisoners, much delay occurs in agreeing upon the terms of the cartel. Such delay sometimes results from a want of good faith on both sides, the parties entering into negotiations with no intention of coming to an agreement. Again, when the cartel has been negotiated, it is sometimes impossible to carry it into effect immediately, the peculiar circumstances of the war and the character of the military operations interrupting, or preventing, its execution. Such delays are the more frequent in great wars, which embrace several countries and seas, within the theatre of their operations. In all cases



where the circumstances prevent an exchange of prisoners of war, or render it impossible for them to receive the means of support from their own state, it is the duty of the captor to furnish them with subsistence; for humanity would forbid his allowing them to suffer or starve. But if their own government should refuse to make arrangements for their support, exchange, or release, and if the captor should give them sufficient liberty to enable them to earn their own support, his responsibility ceases, and whatever sufferings may result, are justly chargeable upon their own government. Under ordinary circumstances, prisoners of war are not required to labor beyond the usual police duty of camp and garrison; but where their own state refuses, or wilfully neglects to provide for their release or support, it is not unreasonable in the captor to require them to pay with their labor for the subsistence which he furnishes them. But this can be done only in extreme cases, and even then they should be treated kindly and with mildness, and no degrading or very onerous labor should be imposed on them. All harshness and unnecessary severity would be contrary to the modern laws of war. (*Wildman, Int. Law*, vol. 2, p. 26; *Vattel, Droit des Gens*, liv. 3, ch. 8, § 150; *Scott, U. S. Army Reg.*, 1825, §§ 709-716; *Grotius, de Jur. Bel. ac Pac.*, lib. 3, cap. 4, § 18; *The St. Juan*, 5 *Rob. Rep.*, p. 39; *Garden, De Diplomatie*, liv. 6, § 9; *Heffter, Droit International*, § 129; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 12; *Bello, Derecho Internacional*, pt. 2, cap. 3, § 5.)

§ 16. But, sometimes the captor refuses to enter into any cartel for the exchange of his prisoners, or even to release them on parole. He may, for reasons satisfactory to himself, persist in retaining in confinement the prisoners which he has taken from the enemy, at the same time leaving the enemy to keep and provide for those of his own people, which the latter may have captured. In such a case, he cannot expect the opposing belligerent to provide for the support of prisoners thus retained, and the laws of war as well as of humanity require, that he himself shall provide, in a proper manner for their subsistence. After the fall of Tarragona in 1811, Suchet, the French commander, offered to exchange his Catalonian prisoners, the best soldiers in Spain,

for the French prisoners confined at Cabrera, men utterly ruined in constitution by their cruel captivity. Cuesta, the Spanish general, was disposed to accede to the proposition, but the Regency, at the request of Wellesley, the British envoy, peremptorily forbid the exchange; and the French prisoners therefore remained, says Napier, "a disgrace to Spain, and to England, for if her envoy interfered to prevent their release, she was bound to insist, that thousands of men, whose prolonged captivity was the result of her interference, should not be exposed on a barren rock, naked as they were born, and fighting for each other's miserable rations to prolong an existence inconceivably wretched." (*Vattel, Droit des Gens*, liv. 3, ch. 8, § 150; *Wildman, Int. Law*, vol. 2, p. 26; *Napier, Hist. Peninsular War*, vol. 2, p. 409.)

§ 17. Where circumstances render it obligatory upon the captor to support the prisoners which he has taken, this support is usually limited to the regular provision ration, and such clothing and fuel as may be absolutely necessary to prevent suffering. Officers and other persons who have the means of paying for their support, cannot require any assistance from the captor. But such as have no money, are certainly entitled to an allowance sufficient for personal comfort; and modern custom and military usage require that it should be proportioned to the rank, dignity, and character of the prisoner. It, however, can never properly be required for any considerable length of time, as prisoners of this description are bound to provide for their own support as soon as they can procure the means of doing so. The monies expended for the support of prisoners of war, may constitute a just demand for reimbursement on the conclusion of peace. Indeed, all monies expended for the support of prisoners of war, under ordinary circumstances, are deemed to be on account of their own government, and such amounts are either settled by commissioners during the war, or become subjects of stipulations in a treaty of peace. (*Wildman, Int. Law*, vol. 2, p. 26; *Garden, De Diplomatie*, liv. 6, § 9; *Heffter, Droit International*, § 129; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 12; *Bello, Derecho Internacional*, pt. 2, cap. 8, § 5; *Scott, U. S. Army Regulations of 1825*, §§ 709, 716.)

§ 18. As there is usually no very great disparity of numbers in the prisoners taken by the opposing belligerents in the course of the war, it is the more modern custom for each captor to support those who may fall into his hands till an exchange can be effected, and a cartel for this purpose is usually negotiated at the earliest possible opportunity. The burthen of supporting the prisoners taken during the war is thus not unequally distributed. It, however, sometimes happens that so very large a number are taken by one party, as to leave no probability of an immediate exchange. The captor is then left the alternative to support them, or to release them on parole. But should they refuse to give their parole, or should their own government forbid their doing so? In the first case they must suffer the consequences of their own obstinacy; and in the second case, their own government has no right to forbid their release on *parole*, unless at the same time it provides the means for their support during their imprisonment. Attempts have sometimes been made to annul such engagements, and to force released prisoners of war to take up arms again in the same campaign, in direct violation of their parole. Such an act on the part of a belligerent government, is utterly futile as a protection to soldiers who may thus be made to violate their parole, and is an evidence of ignorance or semi-barbarism of the government making such a declaration. We have an example in the war between the United States and the republic of Mexico. The Mexican authorities not only attempted by proclamation to induce such of their soldiers as had been released by the Americans on parole, to regard that obligation as null and void, but in some cases their unexchanged prisoners were actually forced to reënter the ranks and fight. Many others, under the promise of plunder, were induced to organize themselves into guerella bands under robber chiefs, who were furnished with military commissions from the government. Such attempts to violate the ordinary rules of war not only justify, but require prompt and severe punishment. Accordingly, General Scott announced his intention to hang every one who should be retaken after thus violating his *parole of honor*. In making further releases on parole, he required, in addition to the ordinary military pledge, the

sanctity of a religious oath, administered by the Mexican clergy. (*Grotius, de Jur. Bel. ac Pac.*, lib. 3, cap. 23, §§ 6–10; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 12; *Bello, Derecho Internacional*, pt. 2, cap. 3, § 5; *Wildman, Int. Law*, vol. 2, p. 26; *Cong. Doc.*, 30 Cong., 1 Sess. *H. R. Ex. Doc. No.* 56, p. 245.)

§ 19. Cases have sometimes occurred, where a general has taken so large a number of prisoners that he cannot keep them with safety, or cannot supply them with food, and is satisfied that if released on their *parole*, they would not respect it. If he has not the means of keeping his prisoners, and can safely put them on *parole*, he is, of course, bound to release them. But the question arises, if he cannot safely do this, and has no means to subsist them, what is he to do? Must he release them, to the imminent danger of his own security, or to his certain destruction, or, will the law of self-defense justify him in putting them to death? If his own safety is incompatible with that of an enemy,—even of an enemy who has submitted,—will his duty to his own state justify him in destroying that enemy? (*Vattel, Droit des Gens*, liv. 3, ch. 8, § 151; *Phillimore, On Int. Law*, vol. 3, § 95; *Garden, De Diplomatie*, liv. 6, § 9; *Manning, Law of Nations*, p. 165.)

§ 20. The extreme case here supposed, can seldom, if ever, happen; for a general can almost always find some means of disposing of, or securing, his prisoners of war, short of deliberately putting them to death. Vattel is evidently of the opinion, that cases may occur where such a course would be justifiable. “But,” he says, “to justify us in coolly and deliberately putting to death a great number of prisoners, the following conditions are indispensable: 1st, That no promise has been made to spare their lives; and 2d, That we be perfectly assured that our own safety demands such a sacrifice. If it is at all consistent with prudence, either to trust to their *parole*, or to disregard their perfidy, a generous enemy will rather listen to the voice of humanity, than to that of timid circumspection. Charles XII., being encumbered with his prisoners after the battle of Narva, only disarmed them, and set them at liberty; but his enemy, still impressed with the

apprehensions which his warlike and formidable opponents had excited in his mind, sent into Siberia all the prisoners he took at Pultowa. The Swedish hero confided too much in his own generosity: the sagacious monarch of Russia united, perhaps, too great a degree of severity with his prudence. When Admiral Anson took the rich Acapulco galleon, near Manilla, he found that the prisoners outnumbered his whole ship's company; he was, therefore, under the necessity of confining them in the hold, where they suffered cruel distress. But, had he exposed himself to the risk of being carried away a prisoner, with his prize and his own ship together, would the humanity of his conduct have justified the imprudence of it? Henry V., king of England, after his victory in the battle of Agincourt, was reduced, or thought himself reduced, to the cruel necessity of sacrificing the prisoners to his own safety." "Nothing," continues Vattel, "short of the greatest necessity, can justify so terrible an execution; and the general, whose situation requires it, is greatly to be pitied." Probably, the opinion of Vattel was justified by the practices of the age in which he wrote, and of those which preceded it, but in the present day, the conduct of any general who should deliberately put his prisoners to death, would be declared infamous, and no possible excuse would remove the stain from his character. (*Vattel, Droit des Gens*, lib. 3, ch. 8, § 151; *Rutherford, Institutes*, b. 2, ch. 9, § 17; *Phillimore, On Int. Law*, vol. 3, § 95; *Garden, De Diplomatie*, liv. 6, § 9; *Burke, The Works of*, vol. 4, p. 127; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 12; *Bello, Derecho Internacional*, pt. 2, cap. 3, § 5; *Burlamaqui, Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 6.)

§ 21. It was an ancient maxim of war, that a weak garrison forfeit all claim to mercy on the part of the conqueror, when, with more courage than prudence, they obstinately persevere in defending an ill-fortified place against a large army, and when, refusing to accept of reasonable conditions offered to them, they undertake to arrest the progress of a power which they are unable to resist. Pursuant to this maxim, Cæsar answered the Aduatici that he would spare their town, if they surrendered before the battering-ram touched their walls. But, though sometimes practiced in

modern warfare, it is generally condemned as contrary to humanity and inconsistent with the principles which, among civilized and christian nations, form the basis of the laws of war. Nor was it altogether admitted by the ancients, for, when Phyton was ordered to be executed by Dionysius the tyrant, for having obstinately defended the town of Rhegium, he protested against it as an unjust punishment, and called upon heaven to avenge his death. Diodorus Siculus regarded such a punishment as unjust; and Alexander the Great, ordered some Milesians to be spared *on account of their courage and fidelity*. It is sometimes said, that where a garrison makes an obstinate defense of a weak place, against an overwhelming force, it only causes useless effusion of human blood, and that, therefore, the authors of such a sacrifice should be severely punished. But who can say beforehand that such a defense may not save the state by delaying the operations of the enemy? There are numerous instances, in ancient as well as modern times, where courage has supplied the defects of fortifications, and where places generally regarded as untenable have been defended by a brave and determined garrison till the enemy consumed his strength in the operation of the siege, and wasted the most favorable season for conducting the campaign. In case a place is closely besieged it is customary for the besieging general to offer to the garrison honorable terms of capitulation; and if they refuse these terms and the place is carried by force, they may be compelled to surrender at discretion, and the captor may treat such prisoners with all the severity of the law of war. But that law, says Vattel, can never extend so far as to give a right to take away the life of an enemy who lays down his arms, unless he has been guilty of some crime against the conqueror. Where, however, the resistance is not only evidently fruitless and without any reasonable object, but springs from obstinacy instead of firmness of valor, the officer so resisting, is guilty of one of the greatest of crimes—the useless sacrifice of human life; and not only does he deserve to be treated with extreme severity by the captor, but also his own government should see that he be justly dealt with for so serious an offense. But the resistance in such a case must be obviously useless, and known to be such

when it is made. If there is any probability of success he is justifiable in holding out to the last extremity. (*Vattel, Droit des Gens*, liv. 3, ch. 8, § 143; *Rutherford, Institutes*, b. 2, ch. 9, § 15; *Bynkershoek, Quaest. Jur. Pub.*, lib. 1, cap. 3; *Grotius, de Jur. Bel. ac Pac.*, lib. 3, cap. 4, § 13; cap. 11, § 16; *Wildman, Int. Law*, vol. 2, p. 25; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 12; *Real, Science du Gouvernement*, tome 5, ch. 2, sec. 6; *De Cussy, Droit Maritime*, liv. 1, tit. 3, § 24.)

§ 22. We do not, at the present day, often hear, when a town is carried by assault, that the garrison is put to the sword in cold blood, on the plea that they have no right to quarter. Such things are no longer approved or countenanced by civilized nations. But we sometimes hear of a captured town being sacked, and the houses of the inhabitants being plundered, on the plea that it was impossible for the general to restrain his soldiery in the confusion and excitement of storming the place; and under that safer name of *plunder*, it has sometimes been attempted to veil "all crimes which man, in his worst excesses, can commit; horrors so atrocious that their very atrocity preserves them from our full execration, because it makes it impossible to describe them." It is true that soldiers sometimes commit excesses which their officers cannot prevent; but, in general, a commanding officer is responsible for the acts of those under his orders. Unless he can control his soldiers, he is unfit to command them. The most atrocious crimes in war, however, are usually committed by militia, and volunteers, suddenly raised from the population of large cities, and sent into the field before the general has time or opportunity to reduce them to order and discipline. In such cases the responsibility of their crimes rests upon the state which employs them, rather than upon the general who is, perhaps, unwillingly, obliged to use them. (*Kent, Com. on Am. Law*, vol. 1, pp. 92, 93; *Vattel, Droit des Gens*, liv. 3, ch. 9, §§ 164, 167; *Pinheiro Ferreira, Notes sur Martens*, tome 2, note 77; *Garden, De Diplomatie*, liv. 6, § 15; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 12.)

§ 23. The truth of these remarks is illustrated by the war of the Spanish Peninsula. None of the generals in that war

pretended, for a moment, that the garrisons and inhabitants of places taken by assault, were not entitled to quarter, or that any rule of modern warfare justified the sacking of captured fortresses, and the pillage and murder of their inhabitants. And yet it would be difficult to find in the history of the most barbarous ages, scenes of drunkenness, lust, rapine, plunder, cruelty, murder and ferocity, equal to those which followed the captures of Ciudad Rodrigo, Badajos, and San Sebastian. The only excuse offered for these horrible atrocities, was: "The soldiers were not to be controlled!" Napier, the English historian of that war, says, in plain terms, "That excuse will not suffice; for a young colonel of energetic spirit, did constrain his men at Ciudad Rodrigo, to keep their ranks for a long time after the disorder commenced; but as no previous general measures had been taken, and no organized efforts made by *higher authorities*, the men were finally carried away in the increasing tumult." "It is said," remarks the same author, "that no soldier can be restrained after storming a town, and a British soldier least of all, because he is brutish and insensible of honor! Shame on such calumnies! \* \* Undoubtedly, if soldiers hear and read that it is impossible to restrain their violence, they will not be restrained. But let the plunder of a town, after an assault, be expressly made criminal by the articles of war, with a due punishment attached; let it be constantly impressed upon the troops that such conduct is as much opposed to military honor and discipline, as it is to morality;

\* \* let instantaneous punishment—death if necessary—be inflicted for such offenses. With such regulations, the storming of towns would not produce more military disorders than the gaining of battles in the field." (*Napier, Peninsular War*, book 22, ch. 2; *Jomini, Vie Politique et Mil. de Napoleon*, chs. 14, 17; *Alison, Hist. of Europe*, vol. 3, pp. 464, 470; vol. 4, p. 240; *Southey, Peninsular War*, vol. 6, p. 240; *Belmas, Sieges, etc.*, tome 4, pp. 279, 469, app.; *Jones, War in Spain*, vol. 2, pp. 64, 76, 80; *Thiers, Consulat et l'Empire*, tome 18, pp. 355, 375.)

§ 24. Fugitives and deserters, says Vattel, found by the victor among his enemies, are guilty of a crime against him, and he has an undoubted right to punish them, and even to



put them to death. They are not properly considered as military enemies, nor can they claim to be treated as such; they are perfidious citizens, who have committed an offense against the state, and their enlistment with the enemy cannot obliterate that character, nor exempt them from the punishment they have deserved. They are not protected by any compact of war, as a truce, capitulation, cartel, etc., unless specially and particularly mentioned and provided for. They are not military enemies in the general meaning of that term, nor are they entitled to the rights of ordinary prisoners of war, either under the law of nations, or by the general terms of a special compact or agreement. But when stipulations of amnesty are introduced into such compacts, in such terms as to include such fugitives and deserters, by fair and proper intendment, good faith requires that all promises of this kind be honestly and fairly carried into effect. A violation of such agreements is infamous. Amnesties of this character are very common where the principal war is accompanied with insurrections and civil commotions, involving questions of personal duty and allegiance. (*Vattel, Droit des Gens*, liv. 3, ch. 8, § 144; *Phillimore, On Int. Law*, vol. 3, § 96; *Heffter, Droit International*, § 126; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 14.)

§ 25. In the operations of a war, the belligerent states not unfrequently adopt the *rule of reciprocity*, both with respect to the person and property of the enemy. Moreover, the same rule, as will be shown hereafter, is extended to neutrals. There is much justice and good sense in this rule, if confined within proper limits. As already remarked, modern usage has restricted many of the extreme rights of war, or, at least, limited their exercise and application. But this usage has not yet assumed the character of a *positive law*, and a belligerent will sometimes refuse to acknowledge its doctrines as fully established, or its rules as obligatory. In such a case, the opposing belligerent applies the rule of reciprocity, and metes out to his enemy the same measure of justice which he receives from him. Thus, if his enemy releases, on *parole*, prisoners of war, he does the same; if his enemy levies heavy contributions upon the conquered, he does the same; and if the enemy, exercising the extreme rights of war, seizes and

destroys, or converts to his own use, public and private property, he retaliates by measures of the same character. (*Garden, De Diplomatie*, liv. 6, § 9; *Wheaton, Elem. Int. Law*, pt. 4, ch. 1, § 10; *The Santa Cruz*, 1 *Rob. Rep.*, p. 64; *Heffler, Droit International*, § 125.)

§ 26. There is, however, a limit to this rule of reciprocity. If the enemy refuses to shape his conduct by the milder usages of war, and adopts the extreme and rigorous principles of former ages, we may do the same; but if he exceed these extreme rights, and becomes barbarous and cruel in his conduct, we cannot, as a general thing, follow and retort upon his subjects, by treating them in like manner. We cannot go beyond the limits prescribed by international law to the rights of belligerents. Thus, the conduct of Great Britain toward Denmark, in 1807, in condemning Danish vessels as droits of admiralty, thereby exercising an extreme right of war, justified Denmark in resorting to the corresponding extreme right of sequestrating British debts due from Danish subjects. So, also, the sequestrating of English debts by France, in 1793, justified England in retaliating by a countervailing measure. Again, the seizure and condemnation of French vessels by Great Britain, in 1803, was an exercise of an ancient and severe rule of war, for which Napoleon retaliated by the exercise of another and still more extreme right, also contrary to the milder rules of modern usage, by seizing all English travelers in French territory. But suppose an enemy should massacre all prisoners of war, this would not afford a sufficient justification for the opposing belligerent to do the same. Suppose our enemy should use poisoned weapons, or poison springs and food, the rule of reciprocity would not justify us in resorting to the same means of retaliation. A savage enemy might kill alike old men, women, and children, but no civilized power would resort to similar measures of cruelty and barbarism, under the plea that they were justified by the law of retaliation. (*Wheaton, Elem. Int. Law*, pt. 4, ch. 1, § 2; *Alison, Hist. of Europe*, vol. 2, p. 270; *Thiers, Consulat et l'Empire*, liv. 17; *Las Casas, Memoires de Napoleon*, vol. 7, pp. 32, 33; *Martens, Nouveau Recueil*, tome 2, p. 16; *Garden, De Diplomatie*, liv. 6, § 9.)

## CHAPTER XIX.

## ENEMY'S PROPERTY ON LAND.

## CONTENTS.

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§ 1. It has already been stated that war, when duly declared, or officially recognized, makes legal enemies of all the individual members of the hostile states; that it also extends to property, and gives to one belligerent the right to deprive the other of everything which might add to his strength, and enable him to carry on hostilities. But this general right is subject to numerous modifications and limitations which have been introduced by custom and the positive law of nations. Thus, although, by the extreme right of war, all

property of an enemy is deemed hostile and subject to seizure, it by no means follows that all such property is subject to appropriation or condemnation, for the positive law of nations distinguishes not only between the property of the state and that of its individual subjects, but also between that of different classes of subjects, and between different kinds of property of the same subject; and particular rules, derived from usage and the practice of nations, have been established with respect to each. We shall confine our remarks, in this chapter, to enemy's property on land. (*Grotius, De Jur. Bel. ac Pac.*, lib. 3, cap. 4, § 8; *Vattel, Droit des Gens*, liv. 3, ch. 9, § 163; *Wheaton, Elem. Int. Law*, pt. 4, ch. 2, § 5; *Polson, Law of Nations*, sec. 6; *Wildman, Int. Law*, vol. 2, p. 9; *Manning, Law of Nations*, pp. 132, et seq.; *Bello, Derecho Internacional*, pt. 2, cap. 4, § 1; *Merlin, Répertoire, verb. Déclaration de Guerre*; *Heffter, Droit International*, §§ 130, 131; *Hautefeuille Des Nations Neutres*, tit. 7, ch. 1.)

§ 2. It will be hereafter shown that a firm possession is sufficient to establish the captor's title to personal or movable property captured on land, but that a different rule applies to immovables or real property; that a belligerent, who makes himself master of the provinces, towns, public lands, buildings, etc., of an enemy, has a perfect right to their possession and use; but that his ownership or dominion is not complete till his conquest is confirmed, in some one of the modes prescribed by the rules of international jurisprudence. In other words, the possession of real property by a belligerent gives him a right to its *use* and to its *products*, but not a completely valid and indefeasible title, with full power of alienation. The original owner is still entitled to the benefit of postliminy. (*Wheaton, Elem. Int. Law*, pt. 4, ch. 2, §§ 5, 11; *Kent, Com. on Am. Law*, vol. 1, pp. 110, 111; *Heffter, Droit International*, §§ 130, 131; *Martens, Précis du Droit des Gens*, §§ 280, 282; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 12.)

§ 3. Some have asserted that the right of a belligerent to the property of an enemy, should be limited to moveables, or such things as may be conveyed or carried away. It is argued that war being but a temporary relation of nations, their practices during such a condition of things should be regulated and limited by the temporary character of that relation;

that, as real property must remain after the termination of the war, and may revert to its former owner by the *jus postliminii*, it can properly never be alienated by the conqueror so long as the war continues. The force of this argument is not readily perceived. The necessity of self-preservation, and the right to punish an enemy, and to deprive him of the means of injuring us, by converting those means to our own use against him, lie at the foundation of the rule, and constitute the right of a belligerent to enemy's property of any kind; and it is difficult to see why this right should be restricted to a particular species of property—to cattle, horses, money, ships, goods—and not include lands or immovables. We think, therefore, that by the just rules of war, the conqueror has the same right to use or alienate the public domain of the conquered or displaced government, as he has to use or alienate its moveable property. This principle, we believe to be recognized and sustained by the general law of nations. (*Wheaton, Elem. Int. Law*, pt. 4, ch. 2, §§ 5, 11; *Vattel, Droit des Gens*, liv. 3, ch. 9, § 13; *Klüber, Droit des Gens, Mod.*, §§ 250–258; *Martens, Precis du Droit des Gens*, §§ 279–282; *Bynkershoek, Quaest. Jur. Pub.*, lib. 1, cap. 6; *Phillimore, On Int. Law*, vol. 3, § 90; *Heffler, Droit International*, §§ 130–133, 186; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 12; *Isambert, Annales, Pol. et Dip.*, introd., p. 115; *Kampts, Literatur des Völkerrecht*, § 307; *Wildman, Int. Law*, vol. 2, p. 9; *Manning, Law of Nations*, p. 277.)

§ 4. It must not, however, be inferred that the title which the purchaser acquires to the two species of property is the same. On the contrary, it is essentially different. The purchaser of moveable property captured on land, acquires a perfect title as soon as the property is in the firm possession of the captor; and the title to a maritime capture is complete when carried *infra praesidia*, or at least after the sentence of a competent court of prize. But the purchase of any portion of the national domain of a conquered country, takes it at the risk of being evicted by the original sovereign owner, if he should be restored to the possession of his dominions. But if such restoration should not take place, and the title of the conqueror should be confirmed by some one of the modes recognized by international law, the title of the pur-

chaser is then made perfect. It was before, a good and valid title against all except the original sovereign owner, under the *jus postliminii*, which right is completely extinguished by a confirmation of the conquest. The conqueror cannot, of course, deny his own act, and attempt the recovery of property which he has already alienated, on the ground that the formal cession or confirmation gives him a new title. He sold the title which he acquired by the rights of conquest; a treaty of peace gives him not her title; it simply confirms that which he already had, by depriving the former sovereign owner of the benefit of postliminy, and thus extinguishing an older adverse outstanding title. (*Wheaton, Elem. Int. Law*, pt. 4, ch. 2, §§ 11–17; *Grotius, de Jur Bel ac Pac.*, lib. 3, cap. 6, § 4; cap. 9, § 13; *Vattel, Droit des Gens*, liv. 3, ch. 13, §§ 197–200, 210, 212; *Klüber, Droit des Gens Mod.*, §§ 256–258; *Martens, Precis du Droit des Gens*, § 282; *Phillimore, On Int. Law*, vol. 3, § 542; *Vide, Post*, chapters xxxii, xxxiii, xxxv.)

§ 5. A question here arises as to who may become the purchasers of immovable property alienated by the conqueror during military occupation, and prior to the confirmation of the conquest. The object of such alienation is, as already stated, to weaken the enemy, and to supply ourselves with the means of carrying on the war. It is evident, therefore, that the subjects of the conquered or displaced government cannot, consistently with their duties to their own sovereign, become such purchasers. They have no right to voluntarily supply us with means for carrying on war against the government to which they owe allegiance. By making such purchases they not only risk the loss of their purchase money on the restoration of the original sovereign to his dominions, but they expose themselves to be punished by their own government for voluntarily furnishing the enemy with the means of prolonging the war. If, however, they are inhabitants of the conquered territory, and their allegiance should be transferred to the new government by the confirmation of the conquest, their title would thereby be made valid, and they themselves be freed from the risk of punishment for having paid the purchase money. Subjects of the conqueror may become purchasers with no other risk than that of being

evicted by the original owner on the restoration or recapture of the real property so alienated. The same may be said of foreigners, or the subjects of a neutral state. Such purchase might, however, in some cases, be deemed a hostile act, and not within the limits of legitimate trade, and not consistent with the character of neutrality, and, therefore, attach to the purchaser the character of an enemy to the displaced or conquered power, in so much as pecuniary assistance is rendered by the purchase money paid. (*Wheaton, Elem. Int. Law*, pt. 4, ch. 2, § 17; *Kent, Com. on Am. Law*, vol. 1, p. 110; *Burlamaqui, Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 7; *De Felice*, note 140 to tome 5 of *Burlamaqui*.)

§ 6. Whether a neutral may make such purchases and not become a party to the war, will depend upon the character of the assistance which, by the purchase, is afforded to the conqueror, to the injury of the opposing belligerent. It is certain that if he should attempt to possess himself, during the continuance of the war, of the lands so purchased, or to maintain the title so acquired, after the restoration or recapture of the property so alienated, he would assume a hostile attitude toward the original sovereign owner and make himself a party to the war. "A third party," says Vattel, "cannot safely purchase a conquered town or province, till the sovereign, from whom it was taken, has renounced it by a treaty of peace, or has been irretrievably subdued, or has lost his sovereignty; for, while the war continues,—whilst the sovereign has still hopes of recovering his possessions by arms,—is a neutral prince to come and deprive him of that opportunity, by purchasing that town or province from the conqueror? The original proprietor cannot forfeit his rights by the act of a third power; and if the purchaser be determined to maintain his purchase, he will find himself involved in the war. Thus, the King of Prussia became a party with the enemies of Sweden, by receiving Stettin from the hands of the King of Poland and the Czar, under the title of sequestration. But when a sovereign has, by a definitive treaty of peace, ceded a country to a conqueror, he has relinquished all the right which he had to it; and it would be absurd for him to be allowed to demand the restitution from a subsequent conqueror who wrests it from the former, or

from any other prince who has purchased it, or received it in exchange, or acquired it by any title whatsoever." (*Vattel, Droit des Gens*, liv. 3, ch. 13, § 198; *Treaty of Schweidt*, Oct. 6th, 1713; *De Felice*, note 140, to tome 5 of *Burlamaqui*.)

§ 7. All implements of war, military and naval stores, and in general, all *moveable* property, belonging to the hostile state, is subject to be seized and appropriated to the use of the captor. And the title to such personal or moveable property is considered as lost to the original proprietor, as soon as the captor has acquired a firm possession; which, as a general rule, is considered as taking place after the lapse of twenty-four hours; so that, immediately after the expiration of that time, it may be alienated to neutrals as indefeasible property. But, with respect to maritime captures, a more absolute or certain species of possession is required, the original title not being, by some, considered as completely divested, until regularly condemned in a competent court of prize. But, this branch of the subject will be particularly discussed in another place; we are here considering only the capture of enemy's property on land. (*Wheaton, Elem. Int. Law*, pt. 4, ch. 2, § 11; *Vattel, Droit des Gens*, liv. 3, ch. 13, § 196; ch. 14, § 209; *Grotius, de Jur. Bel. ac Pac.*, lib. 3, cap. 6, § 8; cap. 9, § 14; *Kluber, Droit des Gens Mod.*, § 254; *Heffter, Droit International*, § 185, 186.)

§ 8. We have discussed in a former chapter the right of a belligerent state to confiscate, on the declaration of war, debts owing by its government, or by its subjects, to subjects of the enemy. We will now consider the right to *capture* them as the property of the enemy, found in hostile territory, by capturing the *documents* which constitute the evidence of such debts. It will be observed that this question is entirely distinct from the right to confiscate a debt, *ipso facto*, by the declaration of war. We have an example from classical history. When Alexander took the city of Thebes, he found an instrument by which it was shown that the Thessalians, who served with him, owed the Thebans an hundred talents. This instrument he gave to the Thessalians as a cancellation of their debt. On the restoration of the Thebans, they demanded the payment of the debt as still due and owing them. The case was referred to the Amphictyonic council,



and their decision is understood to have been in favor of the Thessalians. Quintilian, makes a number of objections to the validity of the *gift*, by Alexander, and offers some important arguments in favor of the demand of the Thebans. To all of these objections and arguments, Puffendorf suggests answers, and opposes the demand, on the following grounds: 1st, that the seizure, being made in solemn war, was a just one; 2d, that the right acquired by war, to a thing taken in war, is a valid title, and must be so regarded in civil law; 3d, that the restoration not being provided for in the treaty of peace, everything is left to the possessor as his own; 4th, that in capturing Thebes, Alexander captured the action of debt due to Thebes, which he might either retain himself or transfer to another; 5th, that the conquest destroyed the former body politic of Thebes, and the new commonwealth established by Cassander, did not succeed to the rights of the one destroyed by Alexander; and 6th, that the Thessalians had obtained the instrument in no unjust manner, it having been given to them by one who had obtained it by the right of conquest. Jurists have generally sustained the supposed decision of the Amphictyons, on the ground of the complete conquest of Thebes, and that Alexander became the universal successor of the conquered state, but not on the ground of the mere capture of the documentary evidence of the debt. The instruments cannot be regarded as the debt, because a creditor may recover his debt, though the instruments be lost or destroyed; they are means, but not the only means of proving that it exists. It is, therefore, held that the mere fact of the conqueror possessing himself of the documents, relating to incorporeal rights, does not give to him the possession of the rights themselves; and as his rights, as derived from military force, are simply those of possession, it is not competent for him to bestow upon, or transfer to another, what he cannot physically take possession of himself. (*Quintilian, Inst. Orat.*, lib. 5, cap. 10; *Puffendorf, de Jur. Nat. et Gent.*, lib. 8, cap. 6, § 23; *Aerodius, Rerum Ind. Pandect*, lib. 2, tit. 2, cap. 1; *Grotius de Jur. Bel. ac Pac.*, lib. 8, cap. 8, § 4; *Alberius Gentilis, de Jure Belli*, lib. 8, cap. 5; *Coccejus, Grotius Illustratus*, lib. 8, p. 202, 236; *Vattel, Droit des Gens*, liv. 6, ch. 14, § 212 *Hotman, Quæst. Illustr.*, sec. 5; *Pfaff*,

*Das Recht der Kriegseroberung*, pp. 165–180; *Brumleger, Diss. de Occupatione Bellica*, p. 38; *Burlamaqui, de Droit de la Nat. et des Gens*, p. 4, ch. 7, § 14; *Phillimore, On Int. Law*, vol. 3, §§ 561, 562; *Heffter, Droit International*, § 184.; *Schweikart, Napoleon und der Kur.*, pp. 74, 82; *Tittman, Ueber den Bund der Amp.*, p. 135.)

§ 9. There is one species of moveable property belonging to a belligerent state which is exempt, not only from plunder and destruction, but also from capture and conversion, viz.: state papers, public archives, historical records, judicial and legal documents, land titles, etc., etc. While the enemy is in possession of a town or province, he has a right to hold such papers and records, and to use them in regulating the government of his conquest; but if this conquest is recovered by the original owner during the war, or surrendered to him by the treaty of peace, they should be returned to the authorities from whom they were taken, or to their successors. Such documents adhere to the government of the place or territory to which they belong, and should always be transferred with it. None but a barbarous and uncivilized enemy would ever think of destroying or withholding them. The reasons of this rule are manifest. Their destruction would not operate to promote, in any respect, the object of the war, but, on the contrary, would produce an animosity and irritation which would extend *beyond* the war. It would inflict an unnecessary injury upon the conquered without any benefit to the conqueror. Moreover, such archives, records, and papers, often constitute the basis and evidence of private property, and their destruction would be a useless destruction of private property; in other words, it would be an injury done in war beyond the necessity of war, and, therefore, illegal, barbarous, and cruel. The same reasons apply to carrying them off and withholding them from their proper owners and legitimate use. (*Real, Science du Gouvernement*, tome 5, ch. 2; *Leiber, Political Ethics*, p. 7, § 25; *Kent, Com. on Am. Law*, vol. 1, p. 92; *Heffter, Droit International*, §§ 180, 181; *Bodinus, De Republica*, lib. 1, p. 84; *Bello, Derecho Internacional*, pt. 2, cap. 4, § 6.)

§ 10. Some have contended that the same rule applies to public libraries and to all monuments of art and models of

taste. But there is an obvious distinction in the two cases. No belligerent would be justifiable in destroying temples, tombs, statutes, paintings, or other works of art, (except so far as their destruction may be the accidental or necessary result of military operations.) But, may he not seize and appropriate to his own use such works of genius and taste as belong to the hostile state, and are of a moveable character? This was done by the French armies in the wars of conquest which followed the revolution of 1789. The practice was condemned by the English writers of that age, but this condemnation seemed rather the result of national prejudice than sound reasoning. The acquisitions of the Parisian galleries and museums from the conquest of Italy, were generally obtained by means of treaty stipulations, or forced contributions levied by Napoleon on the Italian princes. They are equally condemned by the English historians. It should be remembered that but few of the master-pieces taken from Italy were in their original places, or in the possession of their original owners. We need hardly mention the Apollo Belvidere, the Dying Gladiator, the Venus, the Laocoon, the Bronze Horses, etc. Major Henry Lee, an American writer of great ability, discusses this question in his *Life of Napoleon*, and deems these forced contributions as not only justifiable by the laws of war, but as highly creditable to the conqueror, as adding grace and refinement to the warfare, and as reflecting lustre on the French arms, by harmonizing the rudeness of military fame with the softer glories of taste and imagination. It is proper to remark, however, that other distinguished and impartial writers dissent from the foregoing opinion, and regard this species of military contribution as an abuse of the power of conquest, and contrary to the usages of modern civilized warfare. On the invasion of France, in 1815, the pictures, statues, and other monuments of art, collected from other countries, as spoils of war, or acquired under treaties, were seized and distributed among the allies. In the debate in the British house of commons, February 20th, 1816, Sir Samuel Romilly, speaking incidently of this proceeding, stated, that "it was not true that the works of art, deposited in the museum of the Louvre, had all been carried away as the spoils of war; many,

and the most valuable of them, had become the property of France, by express treaty stipulations; and it was no answer to say, that these treaties had been made necessary by unjust aggressions and unprincipled wars, because there would be an end of all faith between nations, if treaties were to be held not to be binding, because the wars out of which they arose were unjust, especially as there could be no competent judge to decide upon the justice of the war, but the nation itself. By whom, too, was it that this supposed act of justice, and this 'great moral lesson,' as it was called, had been read? By the very powers who had, at different times, abetted France in these, her unjust wars! Among other articles carried from Paris, under the pretense of restoring them to their rightful owners, were the celebrated Corinthian horses which had been brought from Venice; but how strange an act of justice was this to give them back their statues, but not to restore to them those far more valuable possessions, their territory and their republic, which were, at the same time, wrested from the Venetians? But the reason of this was obvious: the city and territory of Venice had been transferred to Austria by the treaty of Campo Formio, but the horses had remained the trophy of France; and Austria, whilst she was thus hypocritically reading this moral lesson to nations, not only quietly retained the rich and unjust spoils she had got, but restored these splendid works of art, not to Venice, which had been despoiled of them, the ancient, independent, republican Venice, but to Austrian Venice,—to that country which, in defiance of all the principles which she pretended to be acting on, she still retained as a part of her own dominions." On an examination of all that has been said and written on this subject, and weighing all the circumstances connected with the formation and spoilation of the rich museum of the Louvre, we think the impartial judge must conclude, either that such works of art are legitimate trophies of war, or, that the conduct of the allied powers in 1815, was in direct violation of the law of nations. It is impossible to avoid one or the other conclusion. (*Wheaton, Elem. Int. Law*, pt. 4, ch. 2, § 6; *Kent, Com. on Am. Law*, vol. 1, p. 93; *Vattel, Droit des Gens*, liv. 3, ch. 9, § 168; *Martens, Nouveau Recueil*, tome 2, p. 632; *Life of Romilly*, vol. 2, p.

404; *Stewart's Vice-Adm. Rep.*, p. 482; *Alison, Hist. of Europe*, vol. 3, p. 42; *Lee, Life of Napoleon*, vol. 1; *Scott, Life of Napoleon*, vol. 3, pp. 58-68; *Leiber, Political Ethics*, b. 7, §25.)

§ 11. But whatever may be the decision of the question respecting the right of the conqueror to seize or levy upon such works of art and taste, belonging to the hostile state, as come under the denomination of movable or personal property, it is the modern usage, and one which has acquired the force of law, that such works cannot be wantonly, or unnecessarily, destroyed, and that all structures of a civil character, all public edifices, devoted to civil purposes only, all temples of religion, monuments of art, and repositories of science, are to be exempt from the operations of war. "If the conqueror," says Kent, "makes war upon monuments of art and models of taste, he violates the modern usages of war, and is sure to meet with indignant resentment, and to be held up to the general scorn and detestation of the world." As examples under this head, we may refer to the conduct of the British forces, in 1814, in destroying the capitol, president's house, and other civil public buildings, and the naval monument at Washington, and that of Blucher, in 1815, in destroying the ornamental trees of Paris, and planning the destruction of the bridge of Jena, and the pillar at Austerlitz. (*Polson, Law of Nations*, sec. 6; *Kent, Com. on Am. Law*, vol. 1. p. 93; *Wheaton, Elem. Int. Law*, pt. 4, ch. 2, § 6; *American State Papers*, vol. 3, pp. 693, 694; *Hansard, Parliamentary Debates*, vol. 30, pp. 526, 527; *Alison, Hist. of Europe*, vol. 4, p. 544; *Cassefigue, Hist. de la Restauration*, tome 2, pp. 362, 366; *Gurmoor, Despatches, etc.*, vol. 12, pp. 318, 518; *Bello, Derecho Internacional*, pt. 2, cap. 4, § 6; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 12; *Burlamaqui, Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 7.)

§ 12. Private property on land, is now, as a general rule of war, exempt from seizure or confiscation; and this general exemption extends even to cases of absolute and unqualified conquest. Even where the conquest of a country is confirmed by the unconditional relinquishment of sovereignty by the former owner, there can be no general or partial transmutation of private property, in virtue of any rights of conquest. That which belonged to the government of the vanquished,

passes to the victorious state, which also takes the place of the former sovereign, in respect to the right of eminent domain; but private rights, and private property, both movable and immovable, are, in general, unaffected by the operations of a war, whether such operations be limited to mere military occupation, or extend to complete conquest. Some modern text-writers — Hautefeuille, for example, — contend for the ancient rule, that private property on land is subject to seizure and confiscation. They are undoubtedly correct with respect to the general *abstract right*, as deduced from the law of nature and ancient practice; but while the general right continues, modern usage, and the opinions of modern text-writers of the highest authority, have limited this right by establishing the rule of general exemption. The private property of a sovereign, is considered in the same light as that of any other individual. (*Puffendorf, de Jure Nat. et Gent.*, lib. 8, ch. 6, § 20; *Heffler, Droit International*, § 133; *Isambert, Annales Pol. et Dip. Int.*, p. 115; *Wheaton, Elem. Int. Law*, pt. 4, ch. 2, § 5; *Kent, Com. on Am. Law*, vol. 1, pp. 91–98; *Vattel, Droit des Gens*, liv. 3, ch. 9, § 13; *Klüber, Droit des Gens Mod.*, §§ 250–253; *Martens, Precis du Droit des Gens*, § 282; *Polson, Law of Nations*, sec. 6; *Dodsley, Ann. Reg.*, 1772, p. 37; *Manning, Law of Nations*, p. 135; *Bello, Derecho Internacional*, pt. 2, cap. 4, §§ 3, 6; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 12; *Hautefeuille, Des Nations Neutres*, tit. 7, ch. 1.)

§ 13. But it must also be remembered that there are many exceptions to this rule, or rather, that the rule itself is not, by any means, absolute or universal. The general theory of war is, as heretofore stated, that all private property may be taken by the conqueror, and such was the ancient practice. But the modern usage is, not to touch private property on land, without making compensation, except in certain specified cases. These exceptions may be stated under three general heads: 1st, confiscations or seizures by way of penalty for military offenses; 2d, forced contributions for the support of the invading armies, or as an indemnity for the expenses of maintaining order, and affording protection to the conquered inhabitants; and 3d, property taken on the field of battle, or in storming a fortress or town. (*Kent, Com. on Am.*

*Law*, vol. 1, p. 92; *Vattel, Droit des Gens*, liv. 2, ch. 8, §§ 147, 165; *Polson, Law of Nations*, sec. 6; *Martens, Precis du Droit des Gens*, §§ 279, 280; *Manning, Law of Nations*, p. 136; *Bello, Derecho Internacional*, pt. 2, cap. 4, §§ 3, 4; *Heffler, Droit International*, § 181; *Hautefeuille, Des Nations Neutres*, tit. 7. ch. 1.)

§ 14. In the *first* place, we may seize upon private property, by way of penalty for the illegal acts of individuals, or of the community to which they belong. Thus, if an individual be guilty of conduct in violation of the laws of war, we may seize and confiscate the private property of the offender. So also, if the offense attach itself to a particular community or town, all the individuals of that community or town are liable to punishment, and we may either seize upon their property, or levy upon them a retaliatory contribution, by way of penalty. Where, however, we can discover and secure the individuals so offending, it is more just to inflict the punishment upon them only; but it is a general law of war, that communities are accountable for the acts of their individual members. This makes it the interest of all to discover the guilty persons, and to deliver them up to justice. But if these individuals are not given up, or cannot be discovered, it is usual to impose a contribution upon the civil authorities of the place where the offense is committed, and these authorities raise the amount of the contribution by a tax levied upon their constituents. (*Kent, Com. on Am. Law*, vol. 1, p. 92; *Vattel, Droit des Gens*, liv. 2, ch. 8, § 147; ch. 9, § 165; *Polson, Law of Nations*, sec. 6; *Martens, Precis du Droit des Gens*, §§ 279, 280; *Manning, Law of Nations*, pp. 134–136; *Bello, Derecho Internacional*, pt. 2, cap. 4, §§ 3, 4; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 12; *Scott, Proclamation in Mexico*, April 11th, 1847; *Cong. Doc.*, 30 *Cong.*, 1 *Sess.*, Ex. Doc. No. 56, p. 127.)

§ 15. In the *second* place we have a right to make the enemy's country contribute to the expenses of the war. Troops, in the enemy's country, may be subsisted either by regular magazines, by forced requisitions, or by authorized pillage. It is not always politic, or even possible, to provide regular magazines for the entire supplies of an army during the active operations of a campaign. Where this cannot be done, the general is obliged either to resort to military requi-

sitions, or to entrust their subsistence to the troops themselves. The inevitable consequences of the latter system are universal pillage, and a total relaxation of discipline; the loss of private property, and the violation of individual rights, are usually followed by the massacre of straggling parties, and the ordinary peaceful and non-combatant inhabitants are converted into bitter and implacable enemies. The system is, therefore, regarded as both impolitic and unjust, and is coming into general disuse among the most civilized nations,—at least for the support of the main army. In case of small detachments, where great rapidity of motion is requisite, it sometimes becomes necessary for the troops to procure their subsistence wherever they can. In such a case, the seizure of private property becomes a necessary consequence of the military operations, and is, therefore, unavoidable. Other cases, of similar character might be mentioned. But even in most of these special and extreme cases, provisions might be made for subsequently compensating the owners for the loss of their property. (*Polson, Law of Nations*, sec. 6; *Jomini, Tableau Analytique*, ch. 2, sec. 1, art. 13; *Kent, Com. on Am. Law*, vol. 1, p. 92; *Halleck, Elem. Mil. Art and Science*, ch. 4, pp. 90, 91; *Martens, Precis du Droit des Gens*, § 280; *Manning, Law of Nations*, p. 136; *Garden, De Diplomatie*, liv. 6, § 12; *Bello, Derecho Internacional*, pt. 2, cap. 4, §§ 3, 4; *Heffter, Droit International*, § 131; *Riquelme, Derecho Pub. Int.* lib. 1, tit. 1, cap. 12; *Scott, General Orders*, No. 358, Nov. 25th, 1847; *Scott, General Orders*, No. 395, Dec. 31st, 1847.)

§ 16. In the invasion of the Spanish peninsula, Napoleon had to choose between methodical operations, with provisions carried in the train of his army, or purchased of the inhabitants, and regularly paid for, and irregular warfare, supplying his troops by forced requisitions and pillage. The former was adopted for some of the main armies, moving on prescribed lines, and the latter for the more active masses. Soult and Suchet, in favorable parts of the country, succeeded for a considerable length of time, in procuring regular supplies for their armies, but most of the French generals obtained subsistence for their troops mainly by pillage. Napoleon, at St. Helena, attributed most of his disasters to the animosities thus created among the Spanish people.



(*Napoleon, Memoires of St. Helena; Napier Peninsular War*, b. 24, ch. 6; *Jomini, Tableau Analytique*, ch. 2, sec. 1; *Hallack, Mil. Art and Science*, p. 91.)

§ 17. Upon the invasion of Mexico by the armies of the United States, in 1846, the commanding generals were, at first, instructed to abstain from appropriating private property to the public use without purchase, at a fair price; but subsequently, instructions of a severer character were issued. It was said by the American secretary of war (Mr. Marcy) that an invading army had the unquestionable right to draw its supplies from the enemy without paying for them, and to require contributions for its support, and to make the enemy feel the weight of the war. He further observed, that upon the liberal principles of civilized warfare, either of three modes might be pursued to obtain supplies from the enemy; *first*, to purchase them in open market at such prices as the inhabitants of the country might choose to exact; *second*, to pay the owners a fair price, without regard to what they themselves might demand, on account of the enhanced value resulting from the presence of a foreign army; and, *third*, to require them, as contributions, without paying, or engaging to pay therefor. The last mode was, thereafter to be adopted, if the general was satisfied that in that way he could get abundant supplies for his forces. There can be no doubt of the correctness of the rules of war, as here announced by the American secretary, but the resort to forced contributions for the support of our armies in a country like Mexico, under the particular circumstances of the war, would have been, at least, impolitic, if not unjust, and the American generals very properly declined to adopt, except to a very limited extent, the mode indicated. It would undoubtedly have led to innumerable insurrections and massacres, without any corresponding advantages in obtaining supplies for the American forces. (*Kent, Com. on Am. Law*, vol. 1, p. 92, note; *Mr. Marcy's Letter to Gen. Taylor*, Sept. 22d, 1846; *To Gen. Scott*, April 8d, 1847; *Cong. Doc.*, 30 *Cong.*, 1 *Sess.*, *Senate Ex. Doc.*, No. 1, p. 563; *Scott to Marcy*, May 20th, 1847; *Cong. Doc.*, 30 *Cong.*, 1 *Sess.*, *H. R., Ex. Doc.* No. 60, p. 963; *Mason to Gen. Scott*, Sept. 1st, 1847; *Marcy to Gen. Scott*, Oct. 6th,

1847; *Cong. Doc.*, 30 *Cong.*, 1 *Sess.*, *H. R.*, *Ex. Doc.*, No. 56, pp. 195, 197; *Scott, Gen. Orders* No. 358, Nov. 25th, 1847; *Scott, Gen. Orders* No. 395, Dec. 31st, 1847.)

§ 18. The evils resulting from irregular requisitions and foraging for the ordinary supplies of an army, are so very great and so generally admitted, that it has become a recognized maxim of war, that the commanding officer who permits indiscriminate pillage, and allows the taking of private property without a strict accountability, whether he be engaged in offensive or defensive operations, fails in his duty to his own government, and violates the usages of modern warfare. It is sometimes alleged, in excuse for such conduct, that the general is unable to restrain his troops; but in the eyes of the law, there is no excuse; for he who cannot preserve order in his army, has no right to command it. In collecting military contributions, trustworthy troops should always be sent with the foragers, to prevent them from engaging in irregular and unauthorized pillage; and the party should always be accompanied by officers of the staff and administrative corps, to see to the proper execution of the orders, and to report any irregularities on the part of the troops. In case any corps should engage in unauthorized pillage, due restitution should be made to the inhabitants, and the expenses of such restitution deducted from the pay and allowances of the corps by which such excess is committed. A few examples of such summary justice, soon restores discipline to the army, and pacifies the inhabitants of the country or territory so occupied. But modify and restrict it as you will, the system of subsisting armies on the private property of an enemy's subjects, without compensation, is very objectionable, and almost inevitably leads to cruel and disastrous results. There is, therefore, very seldom a sufficient excuse for resorting to it. If, however, the general be left without the means of support, or if the nature of his operations prevent his carrying subsistence in the train of his army, or of purchasing it in the country passed over, his conduct becomes the result of necessity, and the responsibility of his acts rests upon the government of his state, which has failed to make proper provisions for the support

of his troops, or which has required of him services which cannot be performed without injury and oppression to the inhabitants of the hostile country. (*Kent, Com. on Am. Law*, vol. 1, pp. 91, 92; *Halleck, Elem. Mil. Art and Science*, ch. 4, pp. 94, 95; *Manning, Law of Nations*, p. 136; *Vattel, Droit des Gens*, liv. 3, ch. 9, § 165; *Moser, Beytrage, etc.*, b. 3, § 256; *Heffler, Droit International*, §§ 135, 136; *Hautefeuille, des Nations Neutres*, tit. 7, ch. 1; *Isambert, Annales Pol. et Dip. Int.*, p. 115.)

§ 19. In the *third* place, private property taken from the enemy on the field of battle, in the operations of a siege, or in the storming of a place which refuses to capitulate, is usually regarded as legitimate spoils of war. The *right* to private property, taken in such cases, must be distinguished from the *right* to permit the unrestricted sacking of private houses, the promiscuous pillage of private property, and the murder of unresisting inhabitants, incident to the authorized or permitted sacking of a town taken by storm, as described in the preceding chapter. In other words, we must distinguish between the *title* to property acquired by the laws of war, and the *accidental circumstances* accompanying the acquisition. Thus, the right of prize in maritime captures, and of land in conquests, may be good and valid titles, although such acquisitions are sometimes attended with cruelty and outrage on the part of the captors and conquerors. So with respect to the right of booty acquired in battle or assault; the acquisition may be valid by the laws of war, although other laws of the same code may have been violated by the general or his soldiers in the operations of the campaign or siege. (*Polson, Law of Nations*, sec. 6; *Phillimore On Int. Law*, vol. 3, § 135; *Bello, Derecho Internacional*, pt. 2, cap. 4, § 4; *Heffter, Droit Internacional*, §§ 135, 136; *Ompfeda, Literatur des Volk.*, § 309; *Moser, Versuch, etc.*, b. 9, 2, p. 109; *Puffendorff, De Jur. Nat. et Gent.*, lib. 8, ch. 6, § 21.)

§ 20. Towns, forts, lands, and all immovable property taken from an enemy, are called *conquests*; while captures made on the high seas are called *maritime prizes*; but all movables taken on land come under the denomination of *booty*. All captures in war, whether conquests, prizes, or

booty, naturally belong to the state in whose name, and by whose authority they are made. It alone has such claims against the enemy as will authorize the seizure and conversion of his property; the military forces who make the seizures are merely the instruments of the state, employed for this purpose; they do not act on their individual responsibility, or for their individual benefit. They, therefore, have no other claim to the booty or prizes which they may take, than their government may see fit to allow them. The amount of this allowance is fixed by the municipal laws of each state, and is different in different countries. (*Vattel, Droit des Gens*, liv. 3, ch. 9, § 164; *Kent, Com. on Am. Law*, vol. 1, p. 101; *Grotius, de Jur. Bel ac Pac.*, lib. 3, cap. 6; *The Elsebe*, 5 *Rob. Rep.*, p. 173; *Horne v. Earl Camden*, 2 *H. Black. Rep.*, p. 533; *Bello, Derecho Internacional*, pt. 2, cap. 4, § 4; *Heffter, Droit International*, § 125.)

§ 21. Among the Romans, the soldier was obliged to bring into the public stock all the booty he had taken. This the general caused to be sold, and after distributing a part of the produce of such sale among the soldiers according to their rank, he consigned the residue to the public treasury. It is the general practice in modern times, under the laws and ordinances of the belligerent governments, to distribute the proceeds, or at least a part of the proceeds, of captured property among the captors, as a reward for bravery, and a stimulus to exertion. In France the prize ordinances fully provide for such distribution. In Great Britain, the statutes 6 Anne, c. 13, and c. 37, vest in seamen the prizes they may take. In the United States, the statute of April 23d, 1800, and subsequent laws, direct the manner of distributing the proceeds of prizes on condemnation. Where captures are not so granted away, they enure to the use of the government, on the elementary principle of the laws of war. Some states, in their municipal laws, distinguish between military captures and prizes at sea; in international law, however, they rest on the same principle. Thus, in England no statute passes with respect to military captures, but the proceeds belong to the crown, and are distributed according to the regulations established by the crown. The act of April 10th, 1806, establishing rules and articles for the government of the

armies of the United States, article fifty-eight, requires that "all public stores taken in the enemy's camp, towns, forts, or magazines, whether of artillery, amunition, clothing, forage, or provisions, shall be secured for the service of the United States;" but no provision is made, as in the case of captures by the naval forces, for distributing such captured property, or its proceeds, among the captors, "as a reward for bravery and a stimulus." This act simply affirms the general rule of international law, that such property is to be taken for the government under whose authority the capture is made, and who is responsible to claimants for the legality of the capture. Congress may direct the disposition of booty of war, either by distributing it among the captors, as is done with prize of war, or by transferring it to the treasury. In the absence of any statute as to its disposition, it is used and accounted for under the discretion of the President, as commander-in-chief. (*Kent, Com. on Am. Law*, vol. 1, p. 101; *Wheaton, Reports*, vol. 2, appendix, p. 71; *Finch, Discourse on Law*, pp. 28, 178; *Brymer v. Atkins*, 1 *H. Blacks. Rep.* pp. 189-191; *Alexander v. The Duke of Wellington*, 2 *Russ. and Mylne, Rep.*, p. 35; *Cross et al. v. Harrison*, 16 *Howard Rep.*, p. 164; *Cross, Military Laws*, p. 116; *Bello, Derecho Internacional*, pt. 2, cap. 4, § 4; *Heffler, Droit International*, § 135.)

§ 22. While there is some uncertainty as to the exact limit, fixed by the voluntary law of nations, to our right to appropriate to our own use the property of an enemy, or to subject it to military contributions, there is no doubt, whatever, respecting its waste and useless destruction. This is forbidden alike by the law of nature, and the rules of war. But if such destruction is necessary in order to cripple the operations of the enemy, or to insure our own success, it is justifiable. Thus, if we cannot bring off a captured vessel, we may sink or burn it in order to prevent its falling into the enemy's hands; but we cannot do this in mere wantonness. We may destroy provisions and forage, in order to cut off the enemy's subsistence; but we cannot destroy vines and cut down fruit trees, without being looked upon as savage barbarians. We may demolish fortresses, ramparts, and all structures solely devoted to the purposes of war; but, as already stated, we cannot destroy public or private edifices of a civil

character, temples of religion, and monuments of art, unless their destruction should become necessary in the operations of a siege, or in order to prevent their affording a lodgment or protection to the enemy. (*Kent, Com. on Am. Law*, vol. 1, pp. 92, 93; *Vattel, Droit des Gens*, liv. 3, ch. 9, §§ 167, 172; *Burlamaqui, Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 7; *Polson, Law of Nations*, sec. 6; *Manning, Law of Nations*, p. 189; *Bello, Derecho Internacional*, pt. 2, cap. 4, § 5; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 12.)

§ 23. There are numerous instances in military history where whole districts of country have been totally ravaged and laid waste. Such operations have sometimes been defended on the ground of necessity, or as a means of preventing greater evils. It was on this ground that Italy and Spain justified their destruction of the maritime towns on the coast of Africa, which had become mere nests of pirates. But the sacking of towns and villages, and delivering them up to a prey to fire and the sword, are terrible remedies, which are often worse than the evil to be removed. "Dreadful extremities," says Vattel, "even when we are forced into them; savage and monstrous excesses, when committed without necessity," Another excuse for ravaging a district of country, is to render it a barrier against the advance of an enemy. Thus, the Czar, Peter the Great, laid waste an extent of four score leagues of his own territory, to check the advance of Charles the Twelfth, of Sweden. The victory of Pultowa was claimed as the result of this sacrifice. Again, in 1812, the Russians laid waste a vast extent of country, and burnt their capital, to prevent its affording a shelter to the French, from the rigors of a Polar winter. The disastrous retreat from Moscow was claimed as the fruit of this circumspection. "Such violent remedies," says Vattel, "are to be sparingly applied; there must be reasons of suitable importance to justify the use of them. A prince who should, without necessity, imitate the Czar's conduct, would be guilty of a crime against his people; and he who does the like in an enemy's country, when impelled by no necessity, or induced by feeble reasons, becomes the scourge of mankind." (*Vattel, Droit des Gens*, liv. 3, ch. 8, § 142; ch. 9, §§ 166–172; *Kent, Com. on Am. Law*, vol. 1, p. 92; *Dodsley, Ann. Register*, 1760;

*Martens, Précis du Droit des Gens*, § 280; *Klüber, Droit des Gens Mod.*, §§ 262-265; *Polson, Law of Nations*, sec. 6; *Philimore, On Int. Law*, vol. 3, § 50; *Manning, Law of Nations*, pp. 138, 139; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 12; *Wheaton, Elem. Int. Law*, pt. 4, ch. 2, § 6.)

§ 24. The general rule by which we should regulate our conduct toward an enemy, is that of moderation, and on no occasion should we unnecessarily destroy his property. "The pillage and destruction of towns," says Vattel, "the devastation of the open country, ravaging and setting fire to houses, are measures no less odious and detestable, on every occasion when they are evidently put in practice without absolute necessity, or at least very cogent reasons. But as the perpetrators of such outrageous deeds might attempt to palliate them under pretext of deservedly punishing the enemy, be it here observed that the natural and voluntary law of nations does not allow us to inflict such punishments, except for enormous offenses against the law of nations, and even then, it is glorious to listen to the voice of humanity and clemency, when rigor is not absolutely necessary. Cicero condemns the conduct of his countrymen in destroying Corinth, to avenge the unworthy treatment offered to the Roman ambassadors, because Rome was able to assert the dignity of her ministers, without proceeding to such extreme rigor." (*Vattel, Droit des Gens*, liv. 3, ch. 9, § 173; *Kent, Com. on Am. Law*, vol. 1, p. 92; *Polson, Law of Nations*, sec. 6; *Bello, Derecho Internacional*, pt. 2, cap. 4, § 5.)

§ 25. An English *court of admiralty*, as will be shown hereafter, does not, merely of its own inherent powers, exercise jurisdiction of questions of *booty*, or of captures made on land by military forces, without the presence and coöperation of ships or their crews. The federal courts of the United States have never decided directly upon their jurisdiction of such a question, but from the similarity of English and American admiralty and prize jurisdictions, and the opinion of the court in the case of *The Emulous*, there is little doubt but that our prize courts are limited, in this respect, the same as those of England. It has also been decided in England that a *municipal court* has no jurisdiction of cases of *hostile seizure*; moreover, that the circumstance of the place where the seizure

was made being in the undisputed possession of British power, with a provisional government and organized courts of justice, did not alter the character of the transaction. Wildman remarks: "There is no instance in history or law, ancient or modern, of any question, before any legal judicature, ever having existed about it [booty] in this kingdom. It is often given to the soldiers on the spot, or wrongfully taken by them, contrary to discipline. If there is any dispute it is regulated by the commander-in-chief." As such questions do not come within the jurisdiction of either courts of admiralty or of law, they must be taken cognizance of by the military tribunals, and be governed by military laws and regulations, and by the laws of war. (*Le Caux v. Eden*, 2 Doug. Rep., p. 594; *Lindo v. Rodney*, 2 Doug. Rep., p. 118, note; *Elphinstone v. Bedreechand*, Knapp. Rep., p. 816; *Alexander v. the Duke of Wellington*, 2 Russ. and Mylne Rep., p. 85; *The Two Friends*, 1 Rob. Rep., p. 225; *The Emulous*, 1 Gallis. Rep., p. 538.)

§ 26. In speaking of the constitution, authority and functions of the English prize court, and of the wisely formed and admirably developed code of admiralty jurisdiction and rules of procedure, Mr. Phillimore remarks: "It is not surprising that in great maritime kingdoms, the jurisdiction of the admiral's court should have thrown into the shade, the tribunal of the general. But, that the latter should have left such faint traces of its origin and mode of procedure, and should so soon have fallen into desuetude, is a very remarkable fact in the history of jurisprudence." Mr. Knapp, in a learned note to his report of the great case of the Army of the Deccan, argued before the privy council, in 1838, has shown the error of the dicta of Lord Mansfield, in *Lindo v. Rodney*, repeated in the foregoing extract from Wildman, that "there is no instance in history or law, ancient or modern, of any question ever having existed respecting booty taken in a continental land war, before any legal judicature in this kingdom." It appears from this note of Mr. Knapp, that in very early times, in England, causes respecting booty were determined in the court of chivalry, before the constable and marshal. Lord Hale says: "In matters civil, for which there is no remedy by the common laws, the military jurisdiction continues as well after the war as during the time of



it; for that part of the jurisdiction of the constable and marshal stands still, notwithstanding the war determines, as concerning right of prisoners and booty, military contracts, ensigns, etc." A number of instances are cited, where the court of chivalry took cognizance of cases of goods taken beyond the seas, of prisoners, of hostages, ransom, etc., and where, during the minority of the constable of England, his authority to try such cases was delegated to others by special commission. Since the time of Henry VIII., when the office of constable of England ceased, the jurisdiction of this court was frequently disputed, on the ground that it could not be held before the earl marshal alone, and it finally seems to have fallen into desuetude. The last case tried before it, was that of Sir Henry Blunt, in 1787. The statute of 18 Richard II., chapter second, limited its jurisdiction to cases "which cannot be determined by the common law," and in its proceedings it was to be governed by "the customs and laws of war." (*Phillimore, On Int. Law*, vol. 3, § 127; *Lord Hale, De Praerogativa*, cap. 11, § 3; *Lindo v. Rodney, Douglas Rep.*, p. 593; *Army of the Deccan, 2 Knapp Rep.*, pp. 149-151; *Chambers v. Jennings, 7 Mod. Rep.*, p. 127; *Oldis v. Donmille, Shaw Parl. Cases*, p. 58; *Sir H. Blunt's Case, 1 Atkyn's Rep.*, p. 296.)

§ 27. As no action can be maintained in an English court of *municipal law* with respect to booty, and as courts of *admiralty* have no jurisdiction of the matter, the inquiry arises, what became of this jurisdiction when it ceased to be exercised by the court of the constable and marshal? All booty, as before remarked, belongs to the crown, and is captured under the authority of the crown. The crown must, therefore, ultimately decide upon the legality of the capture and the distribution of the booty. The mode in which it now exercises this jurisdiction, is to refer the claims of those who petition for a share in the distribution, to the lords of the treasury, who lay down the principles which are to govern the case, and a board of trustees are appointed under the royal sign-manual warrant to ascertain, collect and distribute the booty according to the scheme which has been approved and sanctioned by the crown. The privy council have determined that they will not exercise jurisdiction as a court of

appeal from the decisions of the lords commissioners of the treasury, as to grants by the crown of property accruing to it by virtue of its prerogative. They, however, have advised the crown, as in the case of the army of the Deccan, to allow the lords of the treasury to hear council upon points arising between the claimants and the trustees, as to what shall, or shall not, be considered legal booty. By the statute of 1833, the privy council were authorized to hear or consider any matter referred to them by the crown, and to advise thereon; and the statute of 1840, extends the jurisdiction of the high court of admiralty to all matters and questions concerning *booty of war*, or the distribution thereof, which it shall please the crown, by the advice of the privy council, to refer to the judgment of said court, and in all matters so referred, the court shall proceed as in case of *prize of war*, and the judgment of the court shall be binding upon all parties concerned. It, therefore, appears that, although an English prize court, as such, has no jurisdiction of cases of booty, the high court of admiralty may decide such matters and questions concerning booty as shall be referred to it by the crown with the advice of the privy council. (*Phillimore, On Int. Law*, vol. 3, §§ 129–135; *The Army of the Deccan*, 2 *Knapp. Rep.*, p. 106; *Sir Jas. Scarlett, Att'y Gen'l.*, 1 *Knapp. Rep.*, p. 357; *Elphinstone v. Bedreechund*, 1 *Knapp. Rep.*, pp. 360–361; *Case of the Buenos Ayres*, 1 *Dod. Rep.*, p. 29; *Statutes*, 1833, 3 and 4 *Will. iv*, c. 41, s. 4; *Statutes*, 1840, 3 and 4 *Vic.*, c. 65, s. 22.)

## CHAPTER XX.

## ENEMY'S PROPERTY ON THE HIGH SEAS.

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§ 1. While "the progress of civilization has slowly but constantly tended to soften the extreme severity of the operations of war by land," says Wheaton, "it still remains unrelaxed in respect to maritime warfare, in which the private property of the enemy, taken at sea or afloat in port, is indiscriminately liable to capture and confiscation. This inequality in the operation of the laws of war, by land and by sea, has been justified by alleging the usage of consider-

ing private property, when captured in cities taken by storm, as booty; and the well known fact that contributions are levied upon territories occupied by a hostile army, in lieu of a general confiscation of the property belonging to the inhabitants; and that the object of wars by land being conquest, or the acquisition of territory to be exchanged as an equivalent for other territory lost, the regard of the victor for those who are to be his subjects, naturally restrains him from the exercise of his extreme rights in this particular; whereas, the object of maritime war is the destruction of the enemy's commerce and navigation, the sources and sinews of his naval power—which object can only be attained by the capture and confiscation of private property." (*Wheaton, Elem. Int. Law*, pt. 4, ch. 2, § 7; *Polson, Law of Nations*, sec. 6; *Hautefeuille, Des Nations Neutres*, tit. 7, chs. 1, 2; *Martens, Precis du Droit des Gens*, § 281; *Ortolan, Diplomatie de la Mer.*, liv. 8, ch. 2; *Manning, Law of Nations*, p. 136; *Bello, Derecho Internacional*, pt. 2, cap. 4, § 2; *Heffter, Droit International*, § 137; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2; *Jouffroy, Droit Maritime*, pp. 57, et seq.; *Pando, Derecho Internacional*, p. 412; *Nau, Volkerseesecht*, §§ 265, et seq.; *Wildman, Int. Law*, vol. 2, p. 118, et seq.; *De Steck, Versuch, etc.*, pp. 171, et seq.; *Merlin, Repertoire, verb. Prises Maritimes*; *Dalloz, Repertoire, verb. Prises Maritimes*; *Pistoye et Duverdy, Des Prises*, tit. 1, ch. 1.)

§ 2. Several of the ablest continental writers oppose this distinction on principle. The Abbé Mably advocated an entire freedom of commercial intercourse in war, even between the subjects of the belligerent powers; and Emerigon, yielding to the arguments of the Abbé, expresses an earnest desire that the laws of war may be modified or changed accordingly. Others, again, think that the change should extend only to the adoption of the principle that private property on the high seas should be subject to the same rules in war as private property on land; without any modification of the law of war respecting the commercial intercourse of subjects of the belligerent powers. Napoleon, in his memoirs, dictated at St. Helena, says: "Il est à désirer qu'un temps vienne, où les mêmes idées libérales s'entendent sur la guerre de mer, et que les armées navales de deux puissances puissent se battre sans donner lieu à la confiscation

des navires marchands, et sans faire constituer prisonniers de guerre de simple matelots du commerce," etc. The great advantages which England, by means of her naval superiority, has derived from the capture of private property upon the high seas, have tended very much to the maintenance of the rigor of the ancient rule of commercial warfare, while other nations have adopted more liberal principles and views in war upon land,—by which the interests and happiness of the human race have been greatly promoted. (*Emerigon, des Assurances*, ch. 12, § 19; *Mably, Droit Public*, etc., ch. 12, p. 808; *Napoleon, Memoires*, etc., tome 3, ch. 6.)

§ 3. The government of the United States proposed to add to the first article of the "declaration concerning maritime law," made by the conference of Paris, April 16th, 1856, the following words; "and the private property of the subjects or citizens of a belligerent on the high seas shall be exempted from seizure by public armed vessels of the other belligerent, except it be contraband." As already stated, this proposition, although favorably received, has not been adopted by a majority of the powers represented in that conference, and even if it had been, it would bind only those who adopted it, in their intercourse with each other, and could not affect the general rule of international law on that subject. It may therefore be stated as the existing and established law of nations, that, when two powers are at war, they have a right to make prize of the ships, goods, and effects of each other upon the high seas; and that this right of capture includes not only government property, but also the private property of all citizens and subjects of the belligerent powers, and of their allies. Whatever bears the character of enemy's property (with a few exceptions to be hereafter noticed), if found upon the ocean, or afloat in port, is liable to capture as a lawful prize by the opposite belligerent. (*Pistoye et Duverdy, Des Prises*, tit. 1, ch. 1; *Hautefeuille, Des Nations Neutres*, tit. 7, ch. 1; *Wheaton, Elem. Int. Law*, pt. 4, ch. 2, § 7; *Wheaton, On Captures*, App., p. 317; *Kent, Com. on Am. Law*, vol. 1, p. 78; *Duer, On Insurance*, vol. 1, p. 416; *Polson, Law of Nations*, sec. 6; *Bello, Derecho Internacional*, pt. 2, cap. 4, § 2; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, caps 12, 13; *Martens, Presis du Droit des Gens*, § 28; *Ortolan, Diplomatie de la Mer*,

liv. 8, ch. 2; *Heffter, Droit International*, § 187; *Hautefeuille, Des Nations Neutres*, tit. 7, chs. 1, 2; *Jouffroy, Droit Maritime*, p. 57, et seqr.; *Pando, Derecho Pub. Int.*, p. 412; *Wildman, Int. Law*, vol. 2, p. 118, et seqr.; *Merlin, Repertoire, verb. Prise Maritime*; *Manning, Law of Nations*, p. 136; *Dalloz, Repertoire, verb. Prises Maritimes*; *Azuni, Droit Maritime*, tome 2, ch. 4; *Marcy, Letter to Count Sartiges*, July 28th, 1856; *De Cussy, Presis Historique*, ch. 12; *Gardner, Institutes*, ch. 15.)

§ 4. Notwithstanding the clearness and apparent simplicity of this rule, there is frequently great difficulty in its application to particular cases. Where the question turns solely on the evidence as to the facts of the case, it is attended with no other difficulties than those which usually belong to a judicial investigation of facts; but, in numerous cases where the facts are admitted or clearly proved, questions of much difficulty arise as to their legal import under the laws of war, and the rules by which prize courts are, or ought to be, governed. War establishes very different relations between parties from those which exist in the ordinary transactions of trade and pacific intercourse, and from those new relations arise new duties and new obligations. Hence the rules which govern the decisions of prize courts, under the law of nations, with respect to the ownership of property, widely differ, in many respects, from those which obtain in time of peace in the courts of civil or common law. This renders necessary a special examination of the law of prizes, and the investigation of many nice and refined distinctions in the application of that law. (*Duer, On Insurance*, vol. 1, pp. 420, 421; *Kent, Com. on Am. Law*, vol. 1, p. 74; *Bello, Derecho Internacional*, pt. 2, cap. 5, § 1; *Heffter, Droit International*, § 189; *Merlin, Repertoire, verb. Prise Maritime*; *Pistoye et Duverdy, Des Prises*, tit. 6; *Ortolan, Diplomatie de la Mer.*, liv. 3; *Massé, Droit Commercial*, liv. 2; *Hautefeuille, Des Nations Neutres*, tit. 7.)

§ 5. For example, the legality, or illegality of the capture of goods upon the high seas, will frequently turn upon the question of ownership at the time of capture; for when property is shipped from a neutral country to an enemy's, or from an enemy's country to a neutral, the question of its national character, whether it is neutral or hostile, can only

be determined, by ascertaining whether the right of property, at the time of shipment was vested in the shipper or in the consignee. If, in order to determine this question, we were to refer only to the rules established by courts of civil and common law, we should be liable to form an erroneous conclusion, as these rules differ in some respects from those which govern courts of prize, while, in others, they are precisely the same in all courts. (*Kent, Com. on Am. Law*, vol. 1, pp. 86, 87; *Duer, on Insurance*, vol. 1. p. 421; *Pistoye et Duverdy, Prises Maritimes*, tome 1, ch. 1; *Phillimore, On Int. Law*, vol. 3, § 485; *The Packet of Bilbao*, 2 Rob. Rep., p. 386; *The Vrouw Margaretha*, 1 Rob. Rep., p. 386; *The Anna Cartherina*, 4 Rob. Rep., p. 107; *The Danckebaar African*, 1 Rob., Rep. p. 107.)

§ 6. The general rule of law, both international and civil, or common, is, that goods in the course of transportation from one place to another, if they are shipped on account and at the risk of the consignee, in consequence of a prior order or purchase, are considered as his goods during the voyage. The master of a ship, who receives goods, that, by the bill of lading, are expressed to be, and, in fact, are, shipped on account of the consignee, becomes, by the very act, the agent of that consignee, so that the delivery to him has the same effect in vesting the property, as a delivery to his principal. Hence, goods *in transitu* from a neutral country to a belligerent, if they are to be delivered to, and to become the property of a belligerent immediately on their arrival, are considered as his goods during the voyage, *in itinere*, and subject to capture and confiscation. This general rule, as to the effect of a delivery of goods, to the master, for a foreign purchaser, may, both by the civil and common law, be varied by an express stipulation between the parties, or by the usage of a particular trade. If the parties agree that the payment for the goods shall be contingent upon their actual delivery at the foreign port, the whole risk of the voyage being cast upon the shipper, and the contract of sale, until a delivery, being incomplete and executory, the goods, during the voyage, in judgment of law, remain the property of the shipper. So, if the prevailing usage of a particular trade casts the risk upon the consignor, the delivery to the master is not regarded, in law, as a delivery to the consignee; for such a usage pre-

supposes the general agreement of the merchants engaged in the trade to which it refers. But neither of these exceptions to the general rule, that the delivery to the master, as the agent of the consignee, is a delivery to the principal, is admitted in courts of prize, for the very conclusive reason, that, to permit goods, in time of war, to be considered the property of the neutral consignor, instead of the enemy consignee, merely on the ground that the former had assumed the risk of transportation, would at once put an end to captures of enemy's property on the high seas. On every contemplation of a war, in the consignments of goods from neutral ports to an enemy's country, the risk of transportation would be laid on the consignor, and the right of capture would be completely frustrated. Hence, says Sir William Scott, that part of the contract laying the risk of transportation, in time of war, upon the neutral consignor, is invalid; or rather, as the captor has all the rights which belong to the enemy, his taking possession is considered equivalent to an actual delivery to the enemy consignee. The foregoing rule of the prize courts of England, that property consigned to, and to become the property of an enemy, upon arrival, cannot be protected by the neutrality of the shipper, has been explicitly recognized and acted upon by the prize courts of the United States, and approved by American writers of the highest authority. No case directly in point has yet been decided by the supreme court of the United States, but the doctrine has been affirmed in analogous cases, resting substantially on the same grounds; and Mr. Justice Story, in the United States circuit court, says, "that in time of war, property shall not be permitted to change character in its transit, nor shall property consigned to become the property of an enemy upon its arrival, be protected by the neutrality of the shipper. Such contracts, however valid in time of peace, are considered, if made in war, or in contemplation of war, as infringements of belligerent rights, and calculated to introduce the grossest frauds. In fact, if they could prevail, not a single bale of enemy's goods would ever be found upon the ocean." Chancellor Kent, in his commentaries, says, that "property shipped from a neutral to the enemy's country, under a contract to become the property of the



enemy on arrival, may be taken, *in transitu*, as enemy's property; for capture is considered as delivery. The captor, by the rights of war, stands in the place of the enemy. The prize courts will not allow the neutral and belligerent, by a special agreement, to change the ordinary rule of peace, by which goods ordered and delivered to the master, are considered as delivered to the consignee. All such agreements are held to be constitutionally fraudulent, and, if they would operate, they would go to cover all belligerent property while passing between a belligerent and a neutral country; since the risk of capture would be laid alternately on the consignor or consignee, as the neutral factor should happen to stand in one or other of these relations." A contrary doctrine has been held by the courts of the state of New York, but as the decisions of state courts are not of authority in questions of prize, the rule, as decided by Justice Story, must be regarded as established in the United States. (*Duer, On Insurance*, vol. 1, p. 478, note 3; *Kent, Com. on Am. Law*, vol. 1, pp. 86, 87; *The Ann Green*, 1 *Gallis Rep.*, p. 291; *The Frances*, 1 *Gallis Rep.*, p. 450; *The Sally Griffiths*, 3 *Rob. Rep.*, p. 302; *Wildman, Int. Law*, vol. 2, pp. 98, 99; *Abbot, On Shipping*, p. 326; *Ludlow v. Bourne*, 1 *John. Rep.*, p. 1; *De Wolf v. N. Y. Ins. Co.*, 20 *John. Rep.*, p. 214; *The Venus*, 8 *Cranch. Rep.*, pp. 253, 275; *The Merrimack*, 8 *Cranch. Rep.*, pp. 817, 827; *The Mary and Susan*, 1 *Wheaton Rep.*, p. 25; *The San José Indiano*, 1 *Wheaton Rep.*, pp. 208, 212; *The Frances*, 8 *Cranch. Rep.*, p. 183; *Ilsley v. Stubbs*, 9 *Mass. Rep.*, p. 65; *Chandler v. Sprague*, 5 *Met. Rep.*, p. 306.)

§ 7. This rule is not confined to cases where the contract and shipment are made in time of actual war. If they are made in time of peace, but in contemplation of war, and with the manifest intention of protecting the property from hostile capture, they are equally a fraud upon the belligerent power to which the right of capture belongs; and the reasons for the rule of the prize courts, in cases of contract made in time of actual war, given by Sir William Scott and Justice Story, in their decisions, and by Chancellor Kent, in his commentaries, are equally applicable to contracts made in time of peace, but in contemplation of war. We do not, however, find any decision directly on this point; but the view of this question

taken by Mr. Duer seems to be fully sustained by the reasoning of the courts in the cases to which reference is made in the foregoing paragraph. If goods contracted for, and shipped in time of actual war, are liable to capture on the ground of fraud upon the rights of a belligerent, assuredly the same rule would, for the same reason, apply to the same transactions made with the same intention, in contemplation of war. (*Duer, On Insurance*, vol. 1, p. 478; *The Ann Green*, 1 *Gallis. Rep.*, p. 291; *The Frances*, 1 *Gallis. Rep.*, p. 450; *Ludlow v. Brown*, 1 *Johns. Rep.*, p. 1; *De Wolf v. N. Y. F. Insurance Co.*, 20 *Johns. Rep.*, p. 214; 2 *Cowen Rep.*, p. 56; *Kent, Com. on Am. Law*, vol. 1, p. 87; *Wildman, Int. Law*, vol. 2, pp. 100, et seq.)

§ 8. And if the contract is made during a peace, and not in contemplation of war, but the shipment be made after hostilities have commenced, and with a knowledge of the war, the private agreement of the parties, by which the neutral consignor assumes the risk of delivery, will not be permitted to affect the rights of the capturing belligerent. For it was the duty of the consignor, and within his power, in this case, equally as in the former, to guard himself from a contingent loss arising from capture, by requiring a proper security from the consignee. Without such security, he was not bound to make the shipment at all; since, as the contract was not made in expectation of a war, so material a change in its risks, as contemplated by the parties in making the contract, would absolve him from its execution. (*Wildman, Int. Law*, vol. 2, p. 99; *Duer, On Insurance*, vol. 1, pp. 423, 424; *The Sally*, 3 *Rob. Rep.*, p. 300, note; *Kent, Com. on Am. Law*, vol. 1, p. 87; *The Frances*, 1 *Gallis. Rep.*, p. 445; *The Frances*, 8 *Cranch. Rep.*, pp. 335, 359; *The Anna Catharina*, 4 *Rob. Rep.*, p. 112.)

§ 9. But where the shipment of the goods, as well as the contract, laying the risk on the neutral consignor, are both made in time of peace, and not in contemplation of war, the legal ownership which was in the consignor, at the inception of the voyage, remains in him until its termination. The property of the consignor is not divested in favor of a belligerent, by the breaking out of the war, before the arrival of the goods, by which the foreign consignee becomes an ene-

my. The same rule applies where the consignor, at whose risk the shipment was made, is a subject of the belligerent captor, the reason of the exemption being equally applicable to his case. Again, if the contract and shipment be made in time of peace, and not in contemplation of war, and the risk be laid on the neutral consignee, the property being in the consignee, not only by the rules of the civil and common law, but also by the law of nations, the goods are exempt from capture. So, also, if the consignee be a subject of the belligerent captor, for the delivery to the carrier is regarded as the delivery to the consignee, and the goods are neither enemy's goods, nor goods in unlawful trade with the enemy. Both the contract and shipment were lawfully made, and no rule of war being violated by the subject in acquiring the ownership of the property, or in their removal from the country, then friendly but now hostile, the character of the goods is not changed during the voyage, and they are, therefore, not liable to condemnation. (*Wildman, Int. Law*, vol. 2, pp. 99, 100; *Duer, On Insurance*, vol. 1, p. 421; *The Anna Catharina*, 4 *Rob. Rep.*, p. 107; *The Sally*, 3 *Rob. Rep.*, p. 300, note; *The Atlas*, 3 *Rob. Rep.*, p. 299.)

§ 10. And, again, where the goods are shipped by an enemy consignor, during the war, and under a prior sale, or an unconditional contract of sale, the property so shipped vests absolutely in the neutral consignee, by delivery to the master, and, if otherwise innocent, and the title remains unchanged, it is exempted from capture during the voyage. The reason is obvious: the neutral violates no duties toward one belligerent by trade, otherwise lawful, with the opposing belligerent; and the only question is that of ownership, which, by the supposition, is in the neutral consignee. But, as a neutral cover is the common device by which belligerent interests are sought to be protected, shipments of this character are watched with peculiar jealousy, and the clearest evidence of ownership in the consignee is not unreasonably required. "It is not sufficient," says Mr. Duer, "to establish the title, that the bills of lading and the invoice are in the name of the consignee, and express the shipment to be made on his account and risk; for these documents are indispensable to give even the *appearance* of neutral ownership.

It must be shown by what means the title was acquired. If it is alleged that the goods had been paid for, the payment must be proved. If the goods are claimed under a contract of sale, containing provisions for future payment, or under an order for their shipment, the contract, or order, must be produced, and must appear to be absolute and unconditional, so as to bind the consignee positively to the acceptance of the goods, and to take from the consignor any right or power to reclaim them, (unless in the sole event of the insolvency of the consignee,) previous to their arrival. If any election is given to the consignee, or any power of direction or control is retained by the consignor, the goods continue, in the judgment of law, the property of the consignor, and, as such, are liable to capture during the voyage." This doctrine has been clearly established by the British courts of admiralty, and affirmed by the supreme court of the United States. It may be well to illustrate this doctrine by particular cases. Thus, where an American merchant had ordered certain goods from Holland, then at war with England, and the Dutch merchant, instead of sending the goods to him directly, shipped them on his own account to a third person, and directed his correspondent not to deliver over the bill of lading unless payment was provided for in a satisfactory manner, it was held that the goods, which were captured on the voyage, remained the property of the consignor, and as such were liable to condemnation. So, where the goods were shipped under a positive order from the claimant, but the shippers, with a view to their own security, had the bill of lading altered so as to be transferrable to their own order, Sir William Scott held that the goods, being still under the dominion of the shipper, and subject to his control, the ownership was not legally changed, and upon this ground condemned the cargo as the property of the enemy shipper. (*Wildman, Int. Law*, vol. 2, p. 108; *Duer, On Insurance*, vol. 1, pp. 427, 428; *The Aurora*, 4 Rob. Rep., p. 219; *The Noyd, Gedacht*, 2 Rob. Rep., p. 13, note; *The Josephine*, 4 Rob. Rep., p. 25; *The Carolina*, 1 Rob. Rep., p. 304; *The Merrimack*, 8 Cranch. Rep., p. 328; *The Venus*, 8 Cranch. Rep., p. 275; *Abbot, On Shipping*, p. 326.)

§ 11. The same considerations apply where the shipment is made in time of peace by a neutral consignor who becomes

an enemy before the completion of the voyage, although there does not, perhaps, exist the same grounds of suspicion as when the consignor is an enemy at the time of shipment. Nevertheless, the courts, even in this case, require the clearest evidence of neutral ownership. This is illustrated by the case of *The Frances*. Shortly previous to the breaking out of the war between Great Britain and the United States, in 1812, a merchant of Glasgow shipped several bales of goods to certain merchants in New York, and both the bill of lading and the invoice were in the names of the latter, and expressed the shipment to be on their *account and risk*. It appeared, however, by a letter found on board, that the consignor, in making the shipment, had exceeded the order, so that the consignees were in effect released from any obligation to accept the goods, and by this letter he gave them an election to take the whole of the shipment, or none, as they pleased. The goods were captured on the voyage, after war had been declared, by an American privateer, and were condemned as enemy's property. In another case of the same kind, during the same war, the bill of lading expressed the goods to be shipped by a house in Liverpool, unto and on account of certain merchants in New York, and the invoice, signed by a manufacturer in Manchester, described the goods to be consigned to the claimants, but did not specify on whose *account and risk*. And in a letter to the consignees enclosing the invoice, he said "the goods are to be sold on joint account, or on mine alone." The goods were accordingly condemned as the property of the shipper. (*Wildman, Int. Law*, vol. 2, p. 113; *Duer, On Insurance*, vol. 1, pp. 427-431; *Wheaton, On Captures*, pp. 89, 90; *The Frances*, 8 *Cranch Rep.*, p. 354; *The Venus*, 8 *Cranch Rep.*, p. 275.)

§ 12. Where goods are shipped by an enemy consignor to a neutral consignee, not under a prior order, but with the expectation that they will be received on the terms proposed, if they are in fact accepted by the consignee previous to the capture, it was held, by Sir William Scott, that his acceptance vests and perfects his title, and that, upon proof of the fact, the property will be restored. To exempt the property from capture, however, the acceptance must be absolute and unconditional. The transaction is then construed in the same

manner as if the goods had been originally shipped on his account and at his risk. The same point had previously been raised in the supreme court of the United States, but as the acceptance in the case decided was partial and conditional, the court expressly declined to consider what would have been the effect had the acceptance been absolute. (*Kent, Com. on Am. Law*, vol. 1, p. 87; *Duer, On Insurance*, vol. 1, pp. 435, 485; *The Cousine Marianne*, 1 *Edw. Rep.*, p. 346; *The Francis*, 9 *Cranch. Rep.*, p. 185; *Wildman, Int. Law*, vol. 2, p. 112.)

§ 13. Every consignor, not only at common law, but by a rule of the general mercantile law, has, in certain cases, a control over the shipment, which is technically called a *right of stoppage in transitu*; that is, a right to countermand the bill of lading, and re possess himself of the goods, at any time after their shipment and before their arrival at their destined port. The only case in which this right of stoppage in *transitu* can be legally exercised, under the laws of war, is, in the expectation, confirmed by the event, of the insolvency of the consignee. If the consignee, previous to the arrival of the goods, communicate to the consignor his determination not to receive or pay for the goods, these facts are deemed equivalent to actual insolvency. But a revocation of the consignment, from fears of the insolvency of the consignee, which are not confirmed by the event, is not deemed sufficient to change the ownership. The effect of this right, when duly exercised, is to save the property from its liability to capture, where the consignment is made from a neutral to an enemy; and to incur that liability, where the consignment is made from an enemy to a neutral. (*Wildman, Int. Law*, vol. 2, p. 107; *Duer, On Insurance*, vol. 1, pp. 483, 484; *Abbot, On Stoppage*, p. 365; *Emerigon, Traité des Assurances*, ch. 11, sec. 8; *The Constančia*, 6 *Rob. Rep.*, pp. 324, 330; *Floende Venner*, 6 *Rob. Rep.*, p. 329, note; *Ellis v. Hunt*, 8 *Term Rep.*, p. 469; *Oppenheim v. Russell*, 3 *Bos. and Pull. Rep.*, p. 464; *Dutton v. Solomon*, 3 *Bos. and Pull. Rep.*, p. 582; *Coxe v. Harden*, 4 *East Rep.*, p. 211.)

§ 14. But these cases are properly exceptions to the general and well settled rule of the English admiralty, that, in time

of war, the national character of property cannot be changed by a transfer to a neutral during the transportation. That which was enemy's property at the commencement of the voyage, remains liable to capture, until its arrival at the port of destination. Nor, is the application of the rule confined to a transfer in actual war. If it appear that the immediate motive of the transfer, although made in time of peace, was the expectation of war, and that this fact was known to the purchaser, the contract is held to be equally invalid, as against the belligerent whose right of capture was meant to be evaded. "These rights, however," says Mr. Duer, "are an apparent difference in the mode of applying the rule in these cases. In the latter, positive evidence of the intentions of the parties is plainly required; but, in the first, the fact of a transfer is regarded as conclusive proof of the intended fraud." This doctrine seems to have been adopted in its full extent, by the supreme court of the United States. The rule of admiralty, in these and other cases which we have mentioned, is different from that of common law, and its vindication is rested on the ground that its adoption is necessary to the prevention of fraud. A change in the national character of the owner, during the voyage, is not allowed to change the hostile character of property *in transitu*. If he was an enemy at the commencement of the voyage, the property is condemned, notwithstanding he may have become a subject of the capturing power previous to the capture. A Dutch ship, owned and claimed by merchants residing at the Cape of Good Hope, was captured on a voyage from Batavia to Holland, nearly two months after the inhabitants of Good Hope, under the capitulation, had sworn allegiance to the British crown, and had become British subjects. Their ship was condemned, on the sole ground that, "having sailed as a Dutch ship, her character during the voyage could not be changed." The propriety of this decision has been seriously questioned. Although the character of property is not permitted to be varied *in transitu*, from hostile to friendly, or neutral, so as to exempt it from capture and confiscation, nevertheless, if it be neutral or friendly at the commencement of the voyage, its character may be so effectually altered before its termination as to ensure its condemnation. As a general rule, no

matter what its character at the commencement of the voyage, if its owner is an enemy at the time of the capture, the seizure is lawful and confiscation a necessary consequence. Its fate is determined by the real or constructive character of its ownership at the time of seizure; by its real character, if hostile at the time of capture, and by its constructive character, if neutral or friendly when seized, but hostile at the commencement of the voyage. The rights of the captors are vested at the time of the seizure, and cannot be divested by any subsequent change in the national character of the owner. Previous to adjudication, the owner may have become a neutral, an ally, or a subject, but in neither capacity can he claim exemption from confiscation of property seized while he was an enemy. Nor, to warrant a condemnation, is it in all cases necessary that the owner should be an actual enemy at the time of capture. If the seizure is provisionally made in contemplation of hostilities, a subsequent declaration of war has a retroactive effect, converting the neutral or friendly owner into a public enemy, and the precautionary seizure into an act of war. The seizure is at first regarded as provisional, or rather an act of an equivocal character, to be determined by subsequent events. If, in the language of Sir Wm. Scott, the dispute terminates in a reconciliation, the seizure is regarded as a mere civil embargo; but if war follow, it impresses upon the original seizure a direct hostile character. But this particular point has been discussed in another chapter. (*Duer, on Insurance*, vol. 1, pp. 441-444; *Vattel, Droit des Gens*, liv. 2, ch. 18, § 342; *Chitty Com. Law*, vol. 1, pp. 60, 61; *Phillimore, On Int. Law*, vol. 3, § 21; *Wheaton, Elem. Int. Law*, pt. 4, ch. 1, § 4; *The Bodes Lust*, 5 *Rob. Rep.*, pp. 233-250; *The Diana*, 5 *Rob. Rep.*, p. 60; *Wildman, Int. Law*, vol. 2, pp. 101, 102.)

§ 15. The transfer, in time of war, of the vessel of an enemy to a neutral, is a transaction, from its very nature, liable to strong suspicion, and consequently is examined with a jealous and sharp vigilance, and subjected to rules of a peculiar strictness in the prize court of the opposite belligerent. Nevertheless, neutrals have a right to make such purchases of merchant vessels, when they act with good faith; and, consequently, the belligerent powers are not justified, by the law-



of nations, in attempting to prohibit such transfers by a sweeping interdiction, as was done in former years by both the French and English governments. Ordinances of this character form no part of the law of nations, and, consequently, are not binding upon the prize courts, even of the country by which they are issued. Nevertheless, where the sale is claimed to have been made by an enemy to a neutral, in time of war, it is not unreasonable that its motives, nature and terms should be an object of the most searching inquiry. The temptation to fraud, in such cases, is so great that the entire transaction should be most strictly examined, otherwise the opposing belligerent might be deprived of his just rights of capture. Hence courts of admiralty have established very severe rules respecting such transfers. (*Abreu, Tratado de las Presas*, cap. 5, § 8; *Wildman, Int. Law*, vol. 2, p. 84; *Pouget, Droit Maritime*, tome 1, p. 459; *Duer, On Insurance*, vol. 1, pp. 444, 445; *Wheaton, On Captures*, appen., p. 386; *Phillimore, On Int. Law*, vol. 3, § 486; *Hautefeuille, Droit des Nations Neutres*, tit. 11, ch. 2; *Klüber, Droit des Gens Mod.*, § 284; *Cushing, Opinions U. S. Att'ys Genl.*, vol. 6, p. 638; *Rayneval Droit de la Nature*, liv. 3, obs. 14, 15; *The Sechs Geschwistern*, 4 *Rob. Rep.*, p. 100; *The Minerva*, 6 *Rob. Rep.*, p. 899; *The Argo*, 1 *Rob. Rep.*, p. 158.)

§ 16. These rules may be briefly stated as follows: The sale of an enemy's vessel to a neutral purchaser, to be valid, must, in all cases, be absolute and unconditional. The title and interest of the vendor must be completely and absolutely divested. If there is any covenant, condition, agreement, or even tacit understanding, by which he retains any portion of his interest, the entire contract is vitiated, and, in international law, regarded as void. Thus, if the vendee is bound by a condition to restore the vessel at the conclusion of the war; or, if the vendor retains a lien upon the vessel, for the whole or a part of the purchase money, the transfer is held to be colorable and void. Even where the sale is ostensibly absolute, if the vessel continues under the control and management of her former owner, and in the same trade and navigation in which she was previously employed, these circumstances are deemed conclusive evidence of a fraudulent intent to cover, under the name of a neutral, the prop-

erty of an enemy, and the contract is necessarily adjudged to be invalid. So, also, if the neutral vendee, although residing himself in a neutral country, continues to employ the vessel constantly in the trade of the country to which she belonged, she is as thoroughly incorporated in a hostile commerce, as if she had never been transferred. The inference from these circumstances is not to be resisted, that the sole object of the transfer was to enable the vessel to carry on the enemy's trade without a liability, and, consequently, that the sale was collusive, and a meditated fraud upon belligerent rights. But, in these cases, condemnation would follow from the hostile character impressed upon the vessel by the trade in which she is employed, even if the transfer were to be considered as in itself valid. If, says Sir William Scott, a neutral chooses to engage himself in the trade of a belligerent nation, he must be content to bear all the consequences of the speculation; if he confines himself exclusively to the trade and navigation of an enemy's country, he is liable to be considered an enemy, in respect to the vessel so employed. If a merchant vessel of an enemy shelters itself from hostile pursuit in a neutral port, and on account of the difficulty or impossibility of escape, is there sold, it has been contended that such sale is a violation of belligerent rights; but the purchase of a neutral, under such circumstances, if *bona fide*, is considered valid, and sustained by courts of prize. But not so with respect to the purchase of an enemy's ship-of-war, under like circumstances, for it is held that neutrals cannot purchase ships-of-war from either of the belligerents. It has been held by the British courts of prize, that a ship cannot change her character *in transitu*, and that a transfer to a neutral, notwithstanding the *bona fides* of the transaction, will not exempt her from capture and condemnation. This doctrine is sustained by the *dicta* of Mr. Justice Story, in *The Ann Green* and *The Francis*, but the question has not been directly decided in our courts. It, therefore, remains a debatable point with us. Such is a summary of the rules adopted by the British prize courts with respect to the transfer of ships during the war, from one of the belligerents to a neutral. So far as they conform to the rules of evidence and logical proof, established by the practice and consent of the nations

of christendom, they are obligatory, and can neither be resisted nor disputed. But, beyond this, they have no force as rules of international law. For no belligerent nation can impose upon a neutral its regulations, or dictate to such neutral unusual rules of evidence, or arbitrary means of proof. In other words, if a neutral, who has purchased a vessel from a belligerent, holds such vessel by a title valid by the law of nations, he cannot be deprived of it by a prize court, because he does not prove his ownership according to the arbitrary and unusual rules of evidence which that court may adopt. If the sale be valid, it cannot be annulled by any rules which a belligerent nation may see fit to prescribe for itself, but which, by the law of nations, are not obligatory upon neutrals. (*Wildman, Int. Law*, vol. 2, pp. 84, et seq.; *Phillimore, On Int. Law*, vol. 3, p. 486; *Duer, On Insurance*, vol. 1, pp. 446-448; *Kluber, Droit des Gens*, § 234; *Rayneval, Droit de la Nat. et des Gens*, liv. 3, chs. 14, 15; *The Noydt Gedacht*, 2 *Rob. Rep.*, p. 137, note; *The Sechs Geschwistern*, 4 *Rob. Rep.*, p. 100; *The Vigilantia*, 1 *Rob. Rep.*, p. 1; *The Embden*, 1 *Rob. Rep.*, p. 16; *The Jemmy*, 4 *Rob. Rep.*, p. 81; *The Argo*, 1 *Rob. Rep.*, p. 163; *The Vrow Hermina*, 1 *Rob. Rep.*, p. 163; *The Endraught*, 1 *Rob. Rep.*, pp. 18, 19; *The Minerva*, 6 *Rob. Rep.*, pp. 396, 399; *The Omnibus*, 6 *Rob. Rep.*, p. 71; *The Packet de Bilboa*, 2 *Rob. Rep.*, p. 138.)

§ 17. It follows, from the rules of decision heretofore announced, that the character of property on the high seas, whether vessels or goods, results, as a general rule, from the character of their owners, or those who are regarded in international law as the owners. If such owners are hostile, friendly or neutral, according to the particular rules of law applicable to the state of war, their property is, in general, to be considered hostile, friendly or neutral, and as such, is subject to, or exempt from, capture. The laws of war applicable to ownership are, as before remarked, different from those which apply in time of peace, and hence what, by the latter, would be considered the property of a neutral, will not unfrequently by the former, be regarded as the property of an enemy. But there are numerous exceptions to this general rule, that the character of property on the high seas

results from that of its owner, for the property of neutrals, subjects, and allies, is not unfrequently impressed with a hostile character from the circumstances of its locality, use, etc. Thus, ships are deemed to belong to the country under whose *flag* and *pass* they sail; at least, this circumstance is conclusive, as against the party who takes the benefit of them, although they do not bind *other parties*, as against him. So, a ship belonging to a neutral owner may acquire a hostile character from the trade in which she engages, or some particular act which she may do. The same may be said with respect to proprietary interests in cargoes, although, in general, goods have the same national character as their owners; yet they sometimes have impressed on them a hostile character while their owners are friendly or neutral, sometimes from their origin, character, or use, and sometimes from the acts of their owners, of the ship in which they are carried, or of the master in charge of them. These questions will be more particularly discussed in the following chapters, and more especially in that on the determination of national character. (*Wildman, Int. Law*, vol. 2, pp. 93, 94; *Bello, Derecho Internacional*, pt. 2, cap. 5, § 1; *Phillimore, On Int. Law*, vol. 3, §§ 485, 487; *The Vigilantia*, 1 *Rob. Rep.*, pp. 1, 19, 26; *The Vrow Anna Catharina*, 5 *Rob. Rep.*, p. 161; *The Magnus*, 1 *Rob. Rep.*, p. 81; *The Fortuna*, 1 *Dod. Rep.*, p. 87; *The Success*, 1 *Dod. Rep.*, p. 131; *The Princessa*, 2 *Rob. Rep.*, p. 49; *The Anna Catherina*, 4 *Rob. Rep.*, p. 107; *The Rendsborg*, 4 *Rob. Rep.*, p. 121; *The Commercen*, 1 *Wheaton Rep.*, p. 382; *The Phœnix*, 5 *Rob. Rep.*, p. 20; *The Dree Gebroeders*, 4 *Rob. Rep.*, p. 232.)

§ 18. In determining the national character of property, courts of prize generally look only to the legal title; and when, from the papers, the right of property in a captured ship or cargo appears to be vested in an enemy, no equitable or secret liens of a neutral or a subject can be made the foundation of a claim to defeat or vary the rights of the captors. The only exception to this rule, is where the lien is immediately and visibly incumbent upon the property, and consequently, is one which the party claiming its benefit has the means of enforcing without resort to legal process. Of such a nature is the freight due to the owner of the ship, for the

ship-owner has the cargo in his possession, subject to his demand of freight money, by the general law, independent of any contract. The distinction between the two classes of liens is properly expressed in the language of the civil law, by regarding one as a *jus ad rem*, and the other as a *jus in re*. (*Duer, On Insurance*, vol. 1, p. 535; *The San José Juliana*, 2 *Gallis. Rep.*, p. 284; *The Frances*, 18 *Cranch. Rep.*, p. 418; *The Tobago*, 5 *Rob. Rep.*, p. 218; *The Marianna*, 6 *Rob. Rep.*, p. 24.)

§ 19. It is stated by Mr. Wheaton that, in addition to the *certificate of registry*, which is the proof naturally to be looked to for the national character of the ship, the following proofs of property in a vessel and cargo are usually required: "1st, *The Passport or Sea-Letter*. This is a permission from the neutral state to the master of the vessel to proceed on the intended voyage, and usually contains his name and residence, the name, description, and destination of the vessel, with such other matter as the local law and practice require." "2d, *The Muster Roll, or Role d' Equipage*, containing the names, ages, quality, and national character of every person of the ship's company." "3d, *The Charter Party*; if the vessel has been let to hire." "4th, *The Bills of Lading*, by which the master acknowledges the receipt of the goods specified therein, and promises to deliver to the consignee or his order." "5th, *The Invoices*, which contain the particulars and prices of each parcel of the goods, with a statement of the charges thereon." "6th, *The Log-book, or ship's Journal*, which contains an accurate account of the vessel's course, with a short history of the occurrences during the voyage." "As the whole of these papers may be fabricated," says Mr. Wheaton, "their presence does not necessarily imply a fair case; neither does the absence of any of them furnish a conclusive ground of condemnation, as has been most unjustly provided by the ordinances of certain belligerent powers. As they furnish presumptive evidence only of the property in the vessel, and cargo belonging to those to whom it purports to belong; so, on the other hand, their absence affords only presumptive evidence of the existence of enemy interests, which may be rebutted by other proof of a positive nature, accounting for the want of them, and supplying their

place, according to the circumstances of each particular case." At one period it was customary for the government of the United States to issue sea-letters and certificates of ownership to vessels owned by American citizens, whether entitled or not to registry and enrollment. But, since the acts of March 26th, and June 80th, 1810, these particular documents are not often issued. With respect to ships which have been transferred abroad, a bill of sale is the proper evidence of ownership. "A bill of sale," says Lord Stowell, "is the proper title to which the maritime courts of all countries would look. It is the universal instrument of the transfer of ships in the usage of all maritime countries." (*Pistoye et Duverdy, Des Prises*, tit. 6, ch. 2, sec. 4; *Bello, Derecho Internacional*, pt. 2, cap. 8, § 11; *Kent, Com. on Am. Law*, vol. 1, p. 130; *Wheaton, On Captures*, pp. 65, 66; *Duer, On Insurance*, vol. 1, pp. 550, 551; *The Sisters*, 5 *Rob. Rep.*, p. 155; *The Pizarro*, 2 *Wheaton Rep.*, p. 227; *The Amiable Isabella*, 6 *Wheaton Rep.*, p. 1; *The Nerise*, 9 *Cranch. Rep.*, p. 388.)

§ 20. There seems to be some difference in the laws of different states, as well as in the decisions of their courts and in the opinions of their text-writers, with respect to the character of the documents requisite to prove the neutrality of a vessel, and with respect to the effect of those documents even when their genuineness is unimpeached. Bello is of opinion that the passport, or sea-letter, is absolutely indispensable for the security of the vessel. Article two of the French ordonnance of July 26th, 1778, requires that neutral vessels shall prove their neutral character by "*passe-ports, connaissements, factures et autres pièces de abord, l'une desquelles au moins constatera la propriété neutre*," etc. And article six, of the ordonnance of 1861, says: "*Seront encore de bonne prise les vaisseaux, avec leur chargement, dans lesquels il ne sera trouvé chartes-parties, connaissements, ni factures*." Abreu was of opinion, that these words were to be taken collectively, and not distributively. But this is evidently erroneous, for another provision of the ordonnance is (article thirteen) that no friendly or neutral vessel is to be made prize, if the captain produces the "*charte-partie, ou police de chargement*," which latter word signifies the same as *connaissement*. Massé seems to think that the absence of a passport is a necessary cause of confis-

cation, and that it cannot be replaced by any other document. But Hautefeuille, Pistoye et Duverdy, and others, do not consider it as indispensable, and such has been the decision of the French courts. According to English and American decisions, the neutral character of a vessel may be sustained without her having on board either register, or passport; although in the absence of both, the presumption would be against her. *Si a liquid ex solemnibus deficiat, cum aequitas pascit, subveniendum est.* As already stated, the presence of all the usual documents would not be conclusive in her favor. (*Pistoye et Duverdy, des Precis*, tit. 6, ch. 2, sec. 4; *Massé, Droit Commercial*, liv. 2, tit. 1, §§ 342; *Hautefeuille, Des Nations Neutres*, tit. 12; *Merlin, Répertoire, verb. Prises Maritimes*, § 3; *Abreu, Traité des Prises*, pt. 1, ch. 2, § 17; *Valin, Des Prises*, pp. 55, 56; *Martens, Des Amateurs*, § 21; *Dalloz, Répertoire, verb. Prises Maritimes*, sec. 8.)

§ 21. As the French decisions on this subject have differed, in some respects, from our own, we will give a synopsis of a few of the most important. In the case of *Le Nisus* c. *Le Mansoure et Le Rouge*, it was held that a merchant coasting-vessel, without documents aboard, was not good prize, where not required by the laws and usages of its own government; but, in the *Mistick Grec* c. *La Junon*, where such vessel was armed, it was condemned as good prize. In the case of *La Notre-dame du Pilier*, it was held that the evidence of the crew, as to the hostile character of the vessel, must prevail over the neutral character of the papers found aboard. The same decision was confirmed in *Le Munster* c. *Le Brave* and *La Nancy* c. *L'Enjoleur*. In *La Saint-Antoine, et al.*, c. *L'Audacieux*, where the vessels were furnished with double documents, French and belligerent, further evidence was resorted to, which evidence established their hostile character, and they were condemned. In *La Molly* c. *L'Ecole*, notwithstanding the neutral and regular character of the documents found aboard, the vessel was condemned as hostile on other evidence. In the case of *Le Winyau* c. *L'Ariège*, regular neutral papers were shown, but others showing the hostile character of the vessel were also found aboard, and she was condemned. In the case of *Le Reysiger* c. *Le Courageux*, two neutral passports were found aboard, one for coasting, and

the other for a certain destination; it being shown that the second was to be used only on the expiration of the first, the vessel was restored. In the case of *La Fredricka*, it was held, that the effect of documents was not to be determined by their title, but by their contents, and that, where the *instruction du proprietaire* to the captain contained everything that the charter-party, invoice, bill of lading and manifest, usually contain, it would serve as a substitute for them all. The character of the vessel, as friendly or neutral, must, as a general rule, be determined by the documents found aboard and the testimony of the captors, but in case of French vessels having simulated enemy papers aboard for the purpose of deceiving the enemy, papers not on board have been admitted as evidence to exempt such vessel from confiscation, as was decided in the cases of *Le Censor* c. *L'Enterprise* and *Les Deux Charlottes* c. *Le Filibustier*. In the case of *Le Jonge Cornelis* c. *L'Actif, et al.*, the vessel of an ally was allowed to prove her nationality, by documents not on board at the time of capture. In the case of the Swedish vessel *L'Elenora*, it was held that *Lettres de franchise* were a good substitute for the passport; and in the case of *La Carolina Wilhelmina* c. *Le Dragon*, it was held that, in the Baltic, a certificate of ownership would serve the same purpose. In *Le Christiern-Swerin* and *La Paix* c. *Le General-Moreau*, it was held that a neutral passport, to be available, must be renewed as often as the vessel returns to ports of her own country; but (in *Le Quintus* c. *L'Epervier* and *La Bagatelle* c. *Le Basque*) this rule does not apply to coasting-vessels or Levant-traders. In the case of *La Constance* c. *Les Deux-Amis*, where the passport was found to be null and void, the neutrality of the vessel was determined by other documents found aboard. Passports to vessels absent from the country at the time of their issue, are not, in general, available; vide *Le Haabet* c. *L'Heureux*, *Le Munster Doris* c. *Le Brave*, *La Constance* c. *Les Deux-Amis*, *La Famille*, *Le Zenodore* c. *La Charitas*; but vessels purchased by one neutral, in the ports of another neutral power, are exceptions to this rule, vide *L'Engel-Elisabeth* c. *Le Bon-Ordre, et al.*, and *L'Attention* c. *Le Deucalion*; other special exceptions were made in the cases of *La Notre-dame de Bon-Conseil* c. *Le Coureur*, and *L'Amitie* c. *Le Camus*. A passport issued



by a public officer of a neutral state, residing in an enemy country, he being part owner, was held, in *Le Wikilladge* c. *L'Emilie*, to be null, and the vessel a good prize. A passport from America to Africa and back, is not available for trading voyages between Africa and Europe, and a passport for a neutral port is not good for an enemy's port; vide *Le Frederic* c. *L'Ariege*, and *L'Ami de Boston* c. *La Bellone*. A passport to a neutral vessel commanded by an enemy captain by birth, although naturalized a neutral after the declaration of war, especially where he had not been domiciled in neutral country; but where an enemy captain had long resided in the neutral country, he was to be regarded as neutral; vide *L'Acteon* c. *Le Friendship*, *L'Arms* c. *La Mascarde*, and *Le Ruby* c. *Le Baugainville*. Bills of lading signed by the shippers, but not by the captain, are available to prove the neutral character of goods, if the captain has signed the duplicate, delivered to the shippers; vide *La Constance* c. *Les Deux Amis*, *La Louise-Auguste* c. *Le Bonaparte*, and *L'Anna*; it was, also, held, in the same cases, that the want of the captain's signature to the duplicates in his own hands, was no cause of capture, as he could have signed them at any time. Where the charter-party does not contain a manifest of the cargo, the bills of lading are necessary to prove its neutral character; vide *L'Anna*. Where there is no particular bill of lading for a part of the cargo, but the manifest has all the formalities required for bills of lading, it is to be regarded as a general bill of lading, and is sufficient to cover the whole cargo; vide *Le Wilhelm* c. *Le Juste*. (*Pistoye et Duverdy, Des Prises*, tit. 6, ch. 2, sec. 4; *Massé, Droit Commercial*, liv. 2, tit. 1, ch. 2, sec. 3; *Mérin, Répertoire, verb. Prises Maritimes*, § 8, arts. 3, 4; *Dalloz, Répertoire, verb. Prises Maritimes*, sec. 3; *Faugel, Droit Maritime*, tome 1, pp. 428, et seq.)

§ 22. Vessels of *discovery*, or of expeditions of exploration and survey, sent for the examination of unknown seas, islands, and coasts, are, by general consent, exempt from the contingencies of war, and therefore not liable to capture. Like the sacred vessel which the Athenians sent with their annual offerings to the temple of Delos, they are respected by all nations, because their labors are intended for the benefit of all mankind. Thus, when Captain Cook sailed

from Plymouth, in 1776, in the ship *Resolution*, accompanied by the *Discovery*, M. de Sartine, the French minister of marine, dispatched a letter to the admiralties and chambers of commerce throughout the kingdom, to be communicated to the owners and captains of vessels cruising as privateers or otherwise, directing them, in case they met at sea, to treat him and his vessels as neutrals and friends, provided that he, on his side, abstained from all hostility. This praiseworthy example has since been followed by all civilized powers toward vessels similarly employed. It is, however, usual and proper for the government sending out such expeditions, to give formal notice to other powers, describing the character and object of the expedition, the number of vessels employed, the nature of their armament, etc., in order that they may issue the proper instructions to their own vessels on the high seas. Such expeditions must confine themselves most strictly to the object in view; if they commit any act of hostility they forfeit their exemption from capture. (*Emerigon, Traité des Assurances*, ch. 12, sec. 19; *Wilkes, Narrative U. S. Expl. Exp.*, vol. 1, p. xxix; *Paullding, Instructions to Lieut. Wilkes*, Aug. 11th, 1838.)

§ 23. Fishing-boats have, also, as a general rule, been exempted from the effects of hostilities. As early as 1521, while war was raging between Charles V. and Francis, ambassadors from these two sovereigns met at Calais, then English, and agreed, that, whereas the herring fishery was about to commence, the subjects of both belligerents engaged in this pursuit, should be safe and unmolested by the other party, and should have leave to fish as in time of peace. In the war of 1800, the British and French governments issued formal instructions exempting the fishing-boats of each other's subjects from seizure. This order was subsequently rescinded by the British government, on the alleged ground that some French fishing-boats were equipped as gun boats, and that some French fishermen, who had been prisoners in England, had violated their parole not to serve, and had gone to join the French fleet at Brest. Such excuses were evidently mere pretexts; and after some angry discussions had taken place on the subject, the British restriction was withdrawn, and the freedom of fishing was again allowed on

both sides. French writers consider this exemption as an established principle of the modern law of war, and it has been so recognized in the French courts, which have restored such vessels when captured by French cruisers. (*Wildman, Law of Nations*, p. 152; *Dumont, Corps Dip.*, tome 4, p. 352; *Martens, Recueil, etc.*, tome 6, pp. 503–515; *De Cussy, Droit Maritime*, liv. 1, tit. 3, § 36; liv. 2, ch. 20; *Massé, Droit Commercial*, liv. 2, tit. 1, § 333; *Emerigon, Traité des Assurances*, ch. 12, sec. 19.)

§ 24. Some have contended that the rule of exemption ought to extend to cases of shipwreck on a belligerent coast, to cases of forced refuge in a belligerent harbor by stress of weather, or want of provisions, and even to cases of entering such ports from ignorance of the war. There are exceptional cases where such exemption has been granted. Thus, when the English man-of-war the *Elizabeth* had been forced by stress of weather, in 1746, to take refuge in the belligerent port of Havana, the captain offered to surrender himself to the Spanish governor as prisoner, and his vessel as a prize, but the latter refused to take advantage of his distress; on the contrary, he offered him every facility for repairing his vessel, and, on leaving, gave him a safe conduct as far as the Bermudas. Again, in 1780, an English captain entered the Spanish port of San Fernando de Omoa, in Honduras, without knowing that it was belligerent. The Spanish commandant refused to take advantage of his ignorance, but permitted him to provision his ship and to sail unmolested to Jamaica. On the other hand, the French squadron which entered Louisburg, in the Island of Cape Breton, in 1745, ignorant of its hostile character, was captured as prizes, and its officers and crews retained as prisoners of war. The French captain Nalin, entered the port of Granada, in the Antilles, in the war of 1780, ignorant of its hostile character. He was immediately seized as prisoner of war, and his vessel as a good prize. In 1799 a Prussian vessel, *La Diana*, forced to take refuge in the port of Dunkirk, was restored by the French tribunal on the principle of *res sacra miser*; but in the analogous case of *Maria Arendz*, in 1800, the court condemned, in strict conformity with the French ordonnances. A court may be compelled by a sense of duty to condemn in such

cases, but the sovereign power of the state might well exercise its sense of humanity and generosity by restoring even after condemnation. Notwithstanding the plea raised by French writers in such cases that, "*le malaheur opère de plein droit une trêve*," the principle is neither admitted by the general law of nations nor by the maritime ordonnances of France. (*De Cussy, Droit Maritime*, liv. 1, tit. 3, §§ 33, 34; liv. 2, ch. 12; *Pistoye et Duverdy, Des Prises*, tit. 9, ch. 2, sec. 2; *Ordonnance de 1681*; *Ordonnance de 1696*, May 12th; *Règlement de 1778*, July 26th, arts. 14, 15; *Arrête, de de 1800*, March 27th, arts. 19, 20.)

## CHAPTER XXI.

## TRADE WITH THE ENEMY.

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§ 1. It may be stated, as a general proposition, that the property of a subject found engaged in trade or intercourse with the ports, territories, or subjects of a public enemy, is liable to confiscation. This rule is not founded on any peculiar criminality in the intentions of the party, or on any direct loss or injury resulting to the state, but is the necessary consequence of a state of war, which places the citizens or subjects of the belligerent states in hostility to each other, and prohibits all intercourse between them. The protection

of the interests and welfare of the state, makes the application of this rule especially necessary to the merchant and trader, who, under the temptations of an unlimited intercourse with the enemy, by artifice or fraud, or from motives of cupidity, might be led to sacrifice those interests. The same rule is applicable to the subjects of an ally. Where two or more states are allied in a war, the relations of the subjects of the ally toward the common enemy, are precisely the same as those of the subjects of the principal belligerent. In this respect, there is no distinction between the two; and if the courts of their own country do not enforce the rights and duties of war, those of the principal or co-belligerent may do so, for the tribunals of all have an equal right to enforce the laws of war, and to punish any infractions, whether committed by the subjects of their own government, or of that of an ally. As neither of the allies in a common war can relax in favor of its own subjects, without the consent of its co-belligerent, the general rule which prohibits all commercial intercourse with the common enemy, it is held that the subjects of one state cannot plead in the prize courts of its ally, the permission of their own sovereign to engage in such prohibited trade, and that such permission will not exempt from condemnation, the property so employed. This rule seems to be founded on good and substantial reasons. We quote the remarks of Sir William Scott on this point. "It is of no importance," he says, "to other nations, how much a *single belligerent* chooses to weaken and dilute his own rights. But it is otherwise, when *allied nations* are pursuing a common cause against a common enemy. Between them, it must be taken as an implied, if not an express contract, that one state shall not do anything to defeat the general object. If one state permits its subjects to carry on an interrupted trade with the enemy, the consequence may be that it will supply that aid and comfort to the enemy, especially if it is an enemy depending very materially on the resources of foreign commerce, which may be very injurious to the prosecution of the common cause, and the interests of its ally." He therefore concludes, that it is not enough to say that *one* state has given its permission, but that it should also appear that the trade has the allowance of the *confederate*

state, or that it can, in no manner, interfere with the common operations. (*Manning, Law of Nations*, p. 122; *Chitty, Law of Nations*, pp. 276, 277; *Bynkershoek, Quaest. Jur. Pub.*, lib. 1, caps. 9 and 15; *Wheaton, Elem. Int. Law*, pt. 4, ch. 1, §§ 13, 14; *Phillimore, On Int. Law*, vol. 3, §§ 69, et seq.; *Heffter, Droit International*, § 123; *Duer, On Insurance*, vol. 1, pp. 555, 579; *The Neptunus*, 6 *Rob. Rep.*, p. 406; *The Noyade*, 4 *Rob. Rep.*, p. 251; *The Eenigheid*, 1 *Rob. Rep.*, p. 210; *The Hoop*, *Rob. Rep.*, p. 200; *The Jonge Pieter*, 4 *Rob. Rep.*, p. 79; *The Julia*, 1 *Gallis. Rep.*, pp. 601-603; *The Rapid*, 8 *Cranch. Rep.*, p. 155.)

§ 2. There are but two exceptions to this general rule interdicting trade with the enemy: First, the mere exercise of the rights of humanity, and, second, the trade sanctioned by the license or authority of the government. The first of these exceptions would permit intercourse with the enemy, to such a limited extent, and of so rare an occurrence, as to require no particular discussion; the second, results from the fact, that on certain occasions it is highly expedient for the state to permit an intercourse with the enemy, by commerce or otherwise; but the state alone, and not individuals, must determine when it shall be permitted, and under what regulations. Without such direct permission of the state, no commercial intercourse with the enemy is allowed to subsist. (*Wheaton, Elem. Int. Law*, pt. 4, ch. 1, § 13; *Duer, On Insurance*, vol. 1, p. 556; *The Hoop*, 1 *Rob. Rep.*, pp. 199, 200; *Manning, Law of Nations*, p. 123; *Bello, Derecho Internacional*, pt. 2, cap. 2, § 3; *Heffter, Droit International*, § 123; *Wildman, Int. Law*, vol. 2, p. 245; *Jacobsen, Seerecht*, §§ 719-731; *Phillimore, On Int. Law*, vol. 3, § 75.)

§ 3. The rule which prohibits every form of commercial intercourse or trade with the enemy, whether by the subjects of the belligerent or of his allies, is enforced in courts of prize with a stern and inflexible rigor. "No motives of compassion or indulgence," says Mr. Duer, "prompted by the hardship of the particular case, nor any views of public utility, derived from the innocent or beneficial nature of the particular traffic, are ever allowed to suspend or mitigate its application. Such considerations are not regarded as legal

distinctions that can operate to create an exception from the general rule. They may influence properly the discretion of the executive power, but must be rejected by the judicial conscience." No matter how, or under what circumstances, such trade may be carried on, or attempted, (with the single exception already mentioned,) the same penalty of confiscation will attach. It, therefore, is not necessary that the ship in which the goods, engaged in such illegal traffic, are transported, should also belong to a subject of the belligerent whose rights are violated. The vessel may be neutral, but the neutrality of the flag, where the traffic is illegal, will afford no more protection to the goods of a subject than to those of an enemy. It is by means of neutral vessels that such illegal traffic is usually carried on, as appears in most cases in which condemnation has been pronounced. Any attempt by a subject to import goods from the enemy's country, without the license of his own government, is a violation of duty on his part, and involves his property so employed, in the penalty of confiscation. It is not necessary that these goods should be the fruits of any purchase, barter, contract, or negotiation, in the enemy's country after hostilities had commenced. The sailing of the vessel with the goods on board after the party had a knowledge of the war, completes the offense, stamps the cargo with an illegal character, and subjects it, during its transportation, to a rightful seizure. The propriety of strictly adhering to this rule is vindicated by Judge Story, with his usual ability, in the case of *The Rapid*, where the question is fully discussed. (*Duer, On Insurance*, vol. 1, pp. 556-559; *The Lady Jane*, cited 1 *Rob. Rep.*, p. 202; *The William*, cited 1 *Rob. Rep.*, p. 214; *The Jufrow Louisa Margaretha*, cited 1 *Rob. Rep.*, p. 202; *The St. Philip*, cited 8 *Term Rep.*, p. 556; *Eenigheid*, cited 1 *Rob. Rep.*, p. 210; *The Fortuna*, cited 1 *Rob. Rep.*, p. 211; *The Mary*, 1 *Gallis. Rep.*, p. 620; *The Rapid*, 1 *Gallis. Rep.*, p. 295; 9 *Cranch. Rep.*, p. 132; *The Alexander*, 8 *Cranch. Rep.*, p. 159; *Heffter, Droit International*; *Wildman, Int. Law*, vol. 2, p. 245; *Nau, Volkerseerecht*, § 263.)

§ 4. Numerous attempts have been made to evade this rule by allegations of special exceptions. In cases of this kind it has been alleged that the property in the specific goods was



acquired before the war, as in the cases of *The Louisa Margaretha* and *The Rapid*, or that the goods were actually shipped as well as purchased before hostilities commenced, as in the cases of *The Eenigherd*, *The Fortuna*, and *The Mary*; or that the ship on which the goods were found had been forcibly detained, as in the case of *The Alexander*; or that the goods were the produce of funds in the enemy's country which the party had no other means of withdrawing, as in the cases of *The Lady Jane*, *The William*, and *The Rapid*. It was once decided by the English court of common pleas, that goods might be lawfully exported from an enemy's country, although purchased during the war, where the sole object of the purchase was to enable the parties to remit to their own country their funds and effects, which were in the enemy's country when the war was declared; but this exception was subsequently overruled by the court of the king's bench. (*Duer, On Insurance*, vol. 1, pp. 467, 468, 560; *Potts v. Bell*, 8 Term. Rep., p. 548; *Bell v. Gilson*, 1 Bos. and Pul. Rep., p. 345; *The Juffrow Louisa Margaretha*, cited 1 Rob. Rep., p. 203; *The Rapid*, 1 Gallis. Rep., p. 295; 9 Cranch. Rep., p. 132; *The Eenigheid*, 1 Rob. Rep., p. 210, cited; *The Fortuna*, 1 Rob. Rep., p. 211, cited; *The Mary*, 1 Gallis. Rep., p. 620; *The Alexander*, 8 Cranch. Rep., p. 169; *The Lady Jane*, 1 Rob. Rep., p. 202; *The William*, 1 Rob. Rep., p. 214, cited.)

§ 5. Vattel and Burlamaqui concur in the doctrine, that both justice and humanity require that persons who are surprised by a war in an enemy's country, should have a reasonable time to withdraw their persons and effects, and ought not to be treated as enemies, unless their departure should be unreasonably delayed. This view is countenanced by several eminent writers on public law, and the language of Sir William Scott, on several occasions, seems to justify the conclusion that a distinction in favor of persons thus circumstanced would be admitted in the English admiralty. "It seems a necessary deduction," says Mr. Duer, "from these views, that, in the judgment of these writers, the property of persons thus withdrawing themselves from the enemy's country, would, in the course of transportation, be entitled to the protection of their own government; since, otherwise, the very object of the lenity exercised toward

them might be defeated, and that, which was granted as a favor, would be converted into a snare. If the peculiar hardships of confiscating the property of persons thus circumstanced, should induce even the hostile government to relax, for their benefit, the ordinary rules of war, it is evident, that the same consideration addresses itself still more directly, and with greater power, to the justice of their own government. It would, indeed, be a strange assertion, that the very property, which the enemy is bound to release, their own government can be justified in siezing and condemning.

\* \* \* To protect its subjects who retain their allegiance, is the moral obligation that rests upon every government, and where the acts for which the protection is sought are not merely innocent, but meritorious, the obligation presses with a peculiar force. To confiscate the property of subjects, in the act of returning to their allegiance, is the extreme of injustice, as well as of impolicy. It is to punish those whom their country should desire to reward." (*Phillimore, On Int. Law*, vol. 3, § 75; *Duer, On Insurance*, vol. 1, pp. 561-563; *Wheaton, Elem. Int. Law*, pt. 4, ch. 1, § 17; *Vattel, Droit des Gens*, liv. 2, ch. 18, § 844; liv. 3, ch. 4, § 63; ch. 5, §§ 73, 77; *Burlamaqui, Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 7; *Brown v. The U. S.*, 8 *Oranch. Rep.*, p. 125; *Heffter, Droit International*, § 126; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 10; *Bello, Derecho Internacional*, pt. 2, cap. 2, § 2.)

§ 6. A distinction must be here noticed between the property of a citizen *resident* in a foreign country, and that of one *domiciled* in the belligerent state. The property of a citizen domiciled in a foreign country, when that country becomes involved in a war with that of his allegiance, is at once liable to be condemned as that of an *enemy*. But that of a citizen simply resident in the belligerent state, if condemned on his attempt to withdraw it from the enemy's country, must be condemned as that of a citizen engaged in an *unlawful trade with the enemy*. The supreme court of the United States have decided that the property of American citizens *domiciled* in an enemy's country, although shipped before a knowledge of the war, was, by that event, irredeemably stamped with a hostile character, and the goods were condemned as a lawful prize. But the case of a citizen,

merely resident in the enemy's country, presents a very different question. (*Duer, On Insurance*, vol. 1, pp. 503, 563; *Phillips, On Insurance*, vol. 1, p. 84; *Wheaton, Elem. Int. Law*, pt. 4, ch. 1, § 17; *The Venus*, 8 *Cranch. Rep.*, p. 253; *The St. Lawrence*, 9 *Cranch. Rep.*, p. 121; *Amory v. McGregor*, 15 *Johns. Rep.*, p. 24.)

§ 7. If it be admitted that it is the duty of a government to facilitate the withdrawal of its own citizens and their property from an enemy's country, the question next to be considered is, the propriety of requiring the citizens to procure a license from their own government for the transportation of such property. On this question Mr. Duer remarks: "It is, doubtless, right and necessary that a merchant, not resident in an enemy's country, who desires, at the commencement of a war, to withdraw his property and effects, should obtain a license from his own government. He is guilty, otherwise, of a voluntary trading. The good faith of a person who has the power to apply for a license, and neglects the duty, is liable to just suspicions; and the express permission of the government is, in such cases, the only adequate security against abuse and fraud. But the propriety of requiring a person, who is seeking to escape from a hostile country, to continue a residence that exposes his person to imprisonment, and his property to seizure, until a license from his own government can be obtained, so far from being evident, can, by no means, be admitted. His ability to return—to save himself and his property—may depend upon measures, that, to be effectual, must be immediate; and the necessary delay in procuring a license would operate, in most cases, to defeat the execution of the design." Mr. Duer, therefore, adopts the conclusion that a license is not in all cases necessary, and "that the property of subjects withdrawing themselves, in good faith, from a hostile country, within a reasonable time after knowledge of the war, is not stamped with the illegal character of a trading with the enemy; but is to be considered, by a just exception from the general rule, as exempt from confiscation. Such would be the probable decision of the question in the English courts of prize; nor is it by any means certain that an opposite determination would be made, in those of the United States. The

exact question has not yet been determined by the supreme tribunal; nor is its decision involved as a necessary consequence in the cases that have hitherto occurred." (*Duer, On Insurance*, vol. 1, pp. 564–566; *The Madonna dellâ Gracie*, 4 *Rob. Rep.*, p. 198; *The St. Lawrence*, 9 *Cranch Rep.*, p. 121; *Armory v. McGregor*, 15 *Johns. Rep.*, p. 24; *Phillips, On Insurance*, vol. 1, p. 84.)

§ 8. The language of Mr. Justice Story, in the cases of *The Rapid* and *The Mary*, in the circuit court, amounts to a clear denial of the existence of the right in question, under any circumstances; although in the case of *The St. Lawrence*, subsequently decided in the supreme court, where the opinion of the court was given by the same distinguished judge, any direct decision of this question was studiously avoided, and that case was decided on the ground that the property had not been withdrawn from the enemy's country *within reasonable time* after the knowledge of the war. This exact question, as already remarked, has never been determined by the supreme court of the United States, nor is its decision involved, as a necessary consequence, in the cases which have been adjudicated before that tribunal. In a case decided in the supreme court of the State of New York, it was held that a citizen of one belligerent *may* withdraw his property from the country of the other belligerent, provided he does it within a reasonable time after the declaration of the war, and does not himself go to the enemy's country for that purpose. In delivering the opinion of the court in this case, (*Amory v. McGregor*,) Chief Justice Thompson remarks, that, from the guarded and cautious manner in which the supreme court of the United States had reserved itself upon this particular question, there was reason to conclude that when it should be distinctly presented, it would be considered as not coming within the policy of the rule that renders all trading or intercourse with the enemy illegal. (*Duer, On Insurance*, vol. 1, p. 566, note; *Phillips, On Insurance*, vol. 1, p. 84; *The Rapid*, 1 *Gallis. Rep.*, p. 304; *The Mary*, 1 *Gallis. Rep.*, p. 621; *The St. Lawrence*, 9 *Cranch Rep.*, p. 121; *Amory v. McGregor*, 15 *Johns. Rep.*, p. 24; *Bush, Opinions U. S. Atty Genl.*, vol. 1, p. 175.)

§ 9. The only well-established exception to the rule which confiscates all goods imported from the enemy's country, during the war, is where it is shown that the goods were purchased under an order given previous to the commencement of hostilities, and that it was not in the power of the owner, by any diligence, to countermand the order in time to prevent the shipment. It must, however, be clearly shown that all possible diligence was used, after the first notice of hostilities, to countermand the voyage. (*Duer, On Insurance*, vol. 1, p. 560; *The Juffrow Catharina*, 5 Rob. Rep., p. 141; *The Fortuna* 1 Rob. Rep., p. 211; *The Freeden*, 1 Rob. Rep., p. 212; *The Madonna dellâ Gracie*, 4 Rob. Rep., p. 195.)

§ 10. The good faith or mistake of the party, affords no protection to the ship or goods engaged in illegal trade with an enemy. The entire absence of any intention to violate the law, no matter how perfect the innocence of the intent may have been, nor whether the act resulted from mistake or ignorance, cannot avert the penalty of confiscation. In the celebrated case of *The Hoop*, decided by Sir William Scott, the goods had been imported from an enemy's country with the express sanction of the commissioners of the customs, under an erroneous interpretation of a special provision of an act of parliament; but, while admitting and lamenting the hardship of the case, the judge felt himself compelled to pronounce a condemnation. He referred, in his opinion, to numerous cases where the Lords of appeal had rigorously enforced the rule, notwithstanding the strongest mitigating circumstances. (*Duer, On Insurance*, vol. 1, p. 567; *Kent, Com. on Am. Law*, vol. 1, p. 68; *The Hoop*, 1 Rob. Rep., p. 196; *The Charlotte*, 1 Dod. Rep., p. 387; *The Angelique*, 3 Rob. Rep., app. 9; *The Nelly*, 1 Rob. Rep., p. 219, note; *The Franklin*, 6 Rob. Rep., p. 127; *The Noyade*, 4 Rob. Rep., p. 251; *The Joseph*, 1 Gallis. Rep., p. 545; 8 Cranch. Rep., p. 451; *Griswald v. Waddington*, 16 Johns. Rep., p. 438; *Scofield v. Eichelberger*, 7 Peters, Rep., p. 586.)

§ 11. The ulterior destination of the goods determines the character of the trade, no matter how circuitous the route by which they are to reach that destination. Even where the ship in which the goods are embarked is destined to a neutral port, and the goods are there to be unladen, yet, if they

are to be transported thence, whatever may be the mode of conveyance, to an enemy's port or territory, they fall within the interdiction and penalty of the law. The converse of this is also undoubtedly true; that is, trade *from* an enemy's country, through a neutral port, is unlawful, and the goods so shipped through a neutral territory, even though they may be unladen and transhipped, are liable to condemnation. It is an attempt to carry on trade with the enemy, by the circuitous route of a neutral port, and thus evade the penalty of the law. But the law will not countenance any such attempts to violate its principles by a resort to the shelter of neutral territory; any such voyage is illegal at its inception, and the goods shipped are liable to seizure at the instant it commences. A coasting, or colonial trade, limited to the ports of the enemy, so far from meriting any indulgence, is regarded as peculiarly noxious, and the ship and goods so employed, with a knowledge of the war, cannot escape the penalty of condemnation. "The conduct of the citizen," says Duer, "who thus incorporates himself with the commerce and interests of the enemy, admits of no palliation or excuse; it is not simply blameable, but highly criminal." (*Kent, Com. on Am. Law*, vol. 1, p. 81; *Wheaton, Elem. Int. Law*, pt. 4, ch. 1, § 17; *Duer, On Insurance*, vol. 1, pp. 569, 570; *The Diana*, 2 *Gallis. Rep.*, p. 98; *The Wellington*, 2 *Gallis. Rep.*, p. 103; *The Jonge Pieter*, 4 *Rob. Rep.*, p. 79; *Wildman, Int. Law*, vol. 2, p. 20.)

§ 12. A vessel engaged in unlawful trade with the enemy is liable to capture and condemnation at any time during the voyage, in which the offense is committed, but not after the voyage is completed. If, however, the voyage is continuous and entire, although consisting of separable parts, she is liable to capture while any portion of it remains to be performed, even where the part in which the offense was committed has been completed. This point has been fully discussed and decided in the supreme court of the United States. (*Wildman, Int. Law*, vol. 2, pp. 20, 23; *Duer, On Insurance*, vol. 1, pp. 570, 571; *The Joseph*, *Cranch. Rep.*, pp. 454, 455.)

§ 13. Actual trading with the enemy is not necessary to subject a ship or goods to confiscation. It is sufficient, as a

general rule, that they are engaged in a voyage with that design, in order to complete the offense and to incur the penalty. So also a ship belonging to a subject, and proceeding to an enemy's port in ballast, with no positive intention of procuring a cargo, or returning therefrom without any cargo, would be liable to capture both on her outward and return voyage. It would be in vain to allege that there was no act or intention of trading. But the mere intention to trade with the enemy is not punishable, if at the time of capture the execution of the intent is no longer practicable. Where, from fortuitous circumstances, whether known or unknown to the parties, the execution of the design can no longer be effected, the intent does not constitute the crime, for no crime could be committed. A criminal intent is never punishable, if, before the design can be executed, its execution becomes *impossible*. Thus, a British ship bound to a West India island—an enemy's country—but captured after the island had, in fact, surrendered to the British forces, was restored by Sir William Scott. That particular case, however, was distinguished from the general rule as laid down by Duer, which requires the full sanction of judicial decisions. (*Wildman, Int. Law*, vol. 2, p. 22; *Duer, On Insurance*, vol. 1, pp. 571, 572, 628; *The Abby*, 5 *Rob. Rep.*, p. 251; *The Imma*, 8 *Rob. Rep.*, p. 167; *The Lisette*, 6 *Rob. Rep.*, p. 387; *The Trende Sostre*, 6 *Rob. Rep.*, p. 390, in notes; *The Joseph*, 8 *Cranch. Rep.*, p. 454.)

§ 14. Where the property seized for illegal traffic with the enemy, belongs to a house of trade, established in a neutral country, but of which one of the partners is a resident subject of the belligerent country, his share, notwithstanding the neutrality of the house, is condemned. The rule is equally applicable, even where the belligerent party is strictly dormant, and takes no part whatever in the direction and management of the affairs of such trading house. If he is a party interested in the property so contaminated, he must suffer the penalty of the offense. He cannot engage as a partner in a transaction in which he could not lawfully engage, if alone. (*Wildman, Int. Law*, vol. 2, p. 21; *Duer, On Insurance*, vol. 1, p. 573; *The Franklin*, 6 *Rob. Rep.*, p. 127; *The Fortuna*, cited 1 *Rob. Rep.*, p. 211.)

§ 15. Courts of prize regard with extreme suspicion and jealousy, the transfer of ships from subjects to neutrals, during the war. If such a ship is subsequently employed in a trade with the enemy, very slight *indicia* of fraud would cause her condemnation. Thus, an English vessel, asserted to have been sold to a neutral, after hostilities had been commenced between England and Holland, was captured while engaged in trade between Guernsey and Amsterdam, under the command of her former master, who had also been the owner, and it was held by Sir William Scott, that the transfer was colorable and void, and he condemned both ship and cargo. If, however, the transfer be *bona fide*, and the vessel becomes neutral property, it may be employed in all trade, in which neutrals may lawfully engage. (*Wildman, Int. Law*, vol. 2, p. 83; *Duer, On Insurance*, vol. 1, pp. 446–448, 573, 574; *The Omnibus*, 6 *Rob. Rep.*, p. 71; *The Odin*, 1 *Rob. Rep.*, pp. 252, 253.)

§ 16. Regularity of papers, in such cases, are not conclusive evidence of ownership; for, as remarked by Sir William Scott, in the case of *The Odin*, where there is an intention to deceive, the regularity of the paper documents is a necessary part of the apparatus and machinery of the fraud. Although regular documents, if duly verified and supported, are presumptive evidence, yet, if the circumstances and facts of the case lead justly to the conclusion that these papers, however formal, are themselves false, the court will not be bound by them. Where the papers say one thing, and the facts of the case another, the court will exercise a sound judgment as to which the preponderance is due. It has already been stated, that although a vessel be documented as a neutral vessel, it will not be protected by its documents, if the domicile of its owner is hostile. A government may grant the privilege of a national character to vessels for the purpose of its own navigation, but cannot change its national character, to the prejudice of third parties. Consequently, if the real owner of the vessel engaged in trade with the enemy, be a subject of one of the belligerents, its apparent neutral character will not save it from condemnation. (*Wildman, Int. Law*, vol. 2, p. 83; *Duer, On Insurance*, vol. 1, pp. 574, 575; *The Odin*, 1 *Rob. Rep.*, p. 252, 253; *The President*, 5 *Rob. Rep.*, p. 277.)



§ 17. When the trading is from a port of the belligerent, claiming the right of capture, the property is, as a general rule, liable to confiscation, if the owner at the inception of the voyage was a resident in the country, whether as a native subject, a domiciled merchant, a mere stranger, or a sojourner. Every person in a country, (with the limited exception of ambassadors, etc.,) whether a native or stranger, owes obedience to its laws, and the rule of international jurisprudence, which forbids all intercourse and trade with the public enemy, is just as obligatory upon him as the municipal laws of revenue or regulations of police. We have already stated under what circumstances the property of a resident in an enemy's country, is to be deemed hostile; the same circumstances, as a general rule, are sufficient to justify that enemy to treat it as the property of his own subjects, and to subject it to like penalties. (*Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 14; *Duer, On Insurance*, vol. 1, p. 575; *The Indian Chief*, 3 *Rob. Rep.*, p. 17; *Wildman, Int. Law*, p. 15.)

§ 18. There exists, however, an important distinction between the case of a native subject and that of a domiciled stranger or mere sojourner. "The property of the subject," says Mr. Duer, "where the trade was illegal in its origin and intent, cannot be redeemed from its guilt and penalty by any subsequent change of his own residence; but that of the domiciled merchant, or stranger, will be restored, if, previous to its capture, he had, in part, removed from the belligerent country, with the intention of returning to his own; for in this case, the illegality that arose solely from his local and temporary allegiance, by the removal of its cause, has ceased to exist." This distinction has been established in a number of decisions, both in the United States and in England. In the case of *The Indian Chief*, Mr. Johnson, one of the claimants, was an American citizen in his native character, but had resided and was engaged in trade in England, and was still living there, when the ship which he claimed as owner, and which was seized as engaged in a trade with the enemy, commenced her voyage. But as it was clearly proved that he had left England for the United States, and with the *bona fide* intention of resuming his native character, before the seizure, his claim was allowed and the ship restored. Again,

in the case of *The Etrusco*, the claimant was a Swiss by birth, but had been impressed with a French hostile character, by trading under the protection of a French factory in China, and such was his character when the goods were shipped; but he had fortunately quitted China before the capture, and upon this ground the Lords of Admiralty decreed a restoration. In the case of *The Ocean*, the only act upon which Sir William Scott relied, as evidence of the intention of the party, was, that he had made arrangements for withdrawing himself as a partner from a house of trade in the hostile country, and if he is able to show that the evidence on which the captors rely, as fixing his character, had been changed in fact, or in judgment of law, previous to capture, his claim to restitution will be allowed. In the judgment of Chief Justice Marshall, dissolution of partnership, discontinuance of trade in the enemy's country, and other arrangements obviously preparatory to a change of residence, ought all to be considered overt acts, which, when performed in good faith, entitle the claimant to restitution. This seems an important exception to the general rule, that the national character of property on the ocean cannot be changed *in transitu*, during the prosecution of the voyage. (*Duer, On Insurance*, vol. 1, pp. 515–517, 544, 545, 576; *Wildman, Int. Law*, vol. 2, pp. 15, et seq.; *The Frances*, 1 *Gallis. Rep.*, p. 614; *The Venus*, 8 *Cranch. Rep.*, p. 299; *The Frances*, 8 *Cranch. Rep.*, p. 335; *The Ocean*, 5 *Rob. Rep.*, p. 91; *The Etrusco*, cited 3 *Rob. Rep.*, p. 81; *The Indian Chief*, 3 *Rob. Rep.*, pp. 18–21.)

§ 19. If a vessel belonging to one of the belligerents prosecutes a voyage, even to a neutral port, under a license from the government of the enemy, both ship and cargo, while they remain under the protection of such license, are liable to capture and confiscation. Such condemnation results from the presumption, not to be resisted, that the license is granted by the enemy for the furtherance of his own interests, and the citizen or subject who lends himself to the promotion of that object, by accepting such license, violates the plainest duties of his own allegiance. As has already been stated, individual members, composing the state or body politic, are prohibited from all commercial intercourse with the public enemy, unless sanctioned by the express authority of their

own government. In the words of Sir William Scott, no principle should be held more sacred than that an intercourse with the enemy ought not to be allowed to subsist on any other footing than that of the direct permission of the state. The reasons of this rule are fully set forth in the opinion of Mr. Justice Story, in the case of *The Julia*, which opinion was adopted, *in extenso*, by the supreme court of the United States. At the threshold of his opinion, he lays down the fundamental proposition that, "in war, all intercourse between the subjects and citizens of the belligerent countries is illegal, unless sanctioned by the authority of the government, or in the exercise of the rights of humanity." That a personal license from an enemy must be regarded as an implied agreement with such enemy, that the holder of such license will conduct himself in a neutral manner, and avoid any hostile acts toward such enemy. That it is, therefore, a violation of the laws of war, and of his duties to his own government. "Can an American citizen," he asks, "be permitted, in this manner, to carve out for himself a neutrality on the ocean, when his country is at war? Can he justify himself in refusing to aid his countrymen, who have fallen into the hands of the enemy on the ocean, or decline their rescue? Can he withdraw his personal services, when the necessities of the nation require them? Can an engagement be legal, which imposes upon him the temptation or necessity of deeming his personal interests at variance with the legitimate objects of his government?" Incompleteness of a voyage, under license from the enemy, is no defense, for the vessel is liable to capture at the instant the voyage under such license is commenced. To say that the vessel could not be seized till the voyage was completed or abandoned, would be, in effect, saying that the right of capture only exists when the power of making it is at an end. In all cases where the object of the voyage is prohibited, its inception with the illegal intent, completes the offense to which the legal penalty attaches. This case of illegal trading, under a license from the enemy, is only a particular application of a universal rule. Nor is it any defense to allege or prove that the trade is not subservient to the enemy's interest. The condemnation of such licensed vessel and cargo rests upon the broad ground of the illegality of such

voyage, and that the mere sailing under the enemy's license subjects the property to confiscation. The acceptance of such hostile license, by any individual, of a belligerent country, is an act inconsistent with the duties of his allegiance; it is an attempt, on his part, to clothe himself with a neutral character by favor of the other belligerent, and thus to separate himself, without the sanction of his own government, from the common character of his country, and such act is, in itself, a sufficient ground of condemnation. (*Wildman, Int. Law*, vol. 2, p. 259; *Phillimore, On Int. Law*, vol. 3, § 69; *Duer, On Insurance*, vol. 1, p. 587; *The Aurora*, 8 *Oranch. Rep.*, p. 441; *The Hiram*, 1 *Wheaton, Rep.*, p. 440; *The Ariadne*, 2 *Wheat. Rep.*, p. 143; *Colquhoun v. N. Y. F. Insurance Co.*, 15 *Johns. Rep.*, p. 357; *Ogden v. Barker*, 18 *Johns. Rep.*, p. 87; *Craig v. U. S. Ins. Co.*, 1 *Peter. C. C. R.*, p. 410.)

§ 20. The unlawfulness of trade with the enemy extends not only to every place within his dominions, and subject to his government, but also to all places in his possession or military occupation, even though such occupation has not ripened into a conquest, or changed the national character of the inhabitants. In each case there is the same hazard to the state, and, if the hostile occupation is known when the communication is attempted, there is the same breach of duty on the part of the subject. The reasons of public policy, which forbid such intercourse, apply as fully in the one case as in the other. The same rule holds even in the case of a revolted territory, or colony of the enemy, which is known to have been for years in the hands of the insurgents. courts of justice always regard such revolted territory as belonging to the enemy, until, by some public act of their own government, it is expressly recognized as an independent and friendly power. Until such express recognition, courts must regard the revolted territory as a subsisting part of the parent state, with its former relations unaltered. (*Phillips, On Insurance*, vol. 1, p. 82; *Duer, On Insurance*, vol. 1, pp. 590, 591; *The Manilla*, 1 *Edw. Ad. Rep.*, p. 3; *The Pelican*, 1 *Edw. Ad. Rep.*, appen. D.; *Johnson v. Greaves*, 2 *Fount. Rep.*, p. 344; *Blackburne v. Thompson*, 15 *East. Rep.*, p. 81; *Rose v. Himely*, 4 *Oranch. Rep.*, p. 272; *Gelston v. Hoyt*, 18 *Johns. Rep.*, p. 587; *Wildman, Int. Law*, vol. 2,

p. 116; *The Fama*, 5 *Rob. Rep.*, p. 106; *The Boletta*, 1 *Edw. Rep.*, p. 171; *Hagedorn v. Bell*, 1 *Maule and Sel. Rep.*, p. 450; *Bromley v. Hesseltine*, 1 *Camp. Rep.*, p. 75; *Bentzon v. Boyle*, 9 *Cranch. Rep.*, p. 191.)

§ 21. It may be stated, as a general rule, that any insurance, on either vessel or cargo, engaged in illegal trade with the enemy, is illegal, and whenever the goods or vessel are liable to condemnation, the policy of insurance will be declared void. Where the property insured is justly liable to belligerent capture, whether the *delictum*, that is the substantive course of condemnation, exists at the inception of the voyage, or occurs subsequently, but prior to the time the policy attaches, it is considered to be illegal, and is declared void. There are, however, on this question conflicting opinions and decisions, the examination of which does not come within the purpose and object of this work. (*Duer, On Insurance*, vol. 1, p. 748; *Arnould, On Insurance*, pt. 3, ch. 1, sec. 7; *Bedaride, Droit Maritime*, §§ 1095, et seq.)

## CHAPTER XXII.

### RIGHTS AND DUTIES OF NEUTRALS.

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§ 1. *Neutrals* in a war are those who take no part in it, but remain the common friends of the belligerents, favoring the arms of neither to the detriment of the others. "The neutral," says Phillimore, "is justly and happily designated by the latin expression *in bello medius*. It is of the essence of his character that he so retain this central position, as to incline to neither belligerent. He has no *jus bellicum* himself, but he is entitled to the continuance of his ordinary

*jus pacis*, with, as will presently be seen, certain curtailments and modifications which flow from the altered state of the general relations of all countries in time of war." According to Bynkershoek, he has nothing to do with the justice or injustice of the war, and can show no favors to one party in preference to another. The error of Grotius, copied by Vattel, in this respect, has not been followed by subsequent writers. All independent sovereign states have a right to remain neutral in a war, unless otherwise bound by treaties of alliance previously entered into. It is not necessary that they should make any proclamation or public declaration of neutrality; the legal presumption is, that their pacific *status* continues, unless they declare to the contrary. (*Bello, Derecho Internacional*, pt. 2, cap. 7, § 1; *Wheaton, Elem. Int. Law*, pt. 4, ch. 3, §§ 1, 2, 3; *Phillimore, On Int. Law*, vol. 3, §§ 136, 179; *Grotius, de Jur. Bel. ac Pac.*, lib. 3, cap. 17; *Vattel, Droit des Gens*, liv. 3, ch. 7, §§ 113–110; *Bynkershoek, Quaest. Jur. Pub.*, lib. 1, cap. 9; *Klüber, Europ. Völkerrecht*, § 284; *Manning, Law of Nations*, p. 166; *Moser, Versuch, etc.*, B. 10, ch. 1, § 211; *Ortolan, Diplomatie de la Mer*, tome 2, ch. 4; *Garden, De Diplomatie*, liv. 7, § 1; *Heffler, Droit International*, § 144; *Hautefeuille, Des Nations Neutres*, tit. 4, ch. 1; *Hubner, De la Saisie des bâtiments Neu.*, t. 1, pt. 1, ch. 2; *Galiani, De Doveri*, pt. 1, cap. 1; *Azzuni, Droit Maritime*, ch. 1, art. 3, § 1; *Massé, Droit Commercial*, liv. 2, tit. 1, ch. 2; *De Cussy, Droit Maritime*, liv. 1, tit. 3, § 9; *Lampredi, Commerce des Neutres*, pt. 1, § 4.)

§ 2. There is, however, a qualified neutrality which forms an exception to this definition; it arises out of antecedent engagements, by which the neutral state has bound itself to one of the parties to the war, to furnish a limited succor, or to extend certain privileges. The fulfilment of such an engagement, entered into prior to the commencement of hostilities, does not necessarily forfeit the neutral character of a state, nor render it the enemy of the other belligerent party, because it does not render the neutral the general associate of the belligerent to whom the succor or privilege is due. For example, Switzerland has furnished troops to certain European powers, in virtue of treaty stipulations, without herself being involved in the wars in which her troops were

engaged. Denmark, in consequence of a previous treaty, furnished limited succours in ships and troops to Russia, in 1788, against Sweden. By the treaty of amity and commerce between the United States and France, in 1778, the latter secured to herself the special privilege of the admission for her privateers, with their prizes, into American ports, to the exclusion of her enemies; and the admission of her public ships of war, in case of urgent necessity, to refresh, victual, repair, etc., but not exclusively of other nations at war with her. The first of these privileges being exclusive, was complained of by Great Britain and Holland, and France was not satisfied with the interpretation of the latter, by which the public ships of her enemies were admitted into the American ports for the same purposes. To furnish succors, or auxillaries, or to extend privileges to one belligerent, to the detriment of the other, is undoubtedly a violation of strict neutrality, and, as such, is a just cause of complaint, if not of war. The peculiarity of the position of Switzerland, hemmed in on all sides by states having a direct interest in maintaining her neutrality, has generally prevented complaints against her, for furnishing a limited number of troops to one or more of the parties to a war. If she had been a commercial or maritime state, says Massé, a different rule would undoubtedly have been applied to this singular state of things. She has recently passed regulations prohibiting her citizens from enlisting in foreign service. There can be no question, that her former conduct, in this respect, was a violation of her neutrality. So, also, are the minor acts of partiality mentioned in the preceding paragraph; but, as Phillimore justly remarks, it would be pedantically rigid to consider, as a violation of neutrality, the allowing prizes captured by one belligerent to be brought into the neutral port,—especially in compliance with the provisions of a treaty made antecedently to the war. How far a neutrality, thus qualified and limited, may be tolerated by the belligerent against whom the partiality is shown, is a question of expediency, rather than of right, and is generally governed by political circumstances. (*Vattel, Droit des Gens*, liv. 3, ch. 7, §§ 101–105; *Wheaton, Elem. Int. Law*, pt. 4, ch. 3, §§ 4–6; *Kent, Com. on Am. Law*, vol. 1, p. 116; *Phillimore, On*



*Int. Law*, vol. 8, §§ 138, et seq.; *Massé, Droit Commercial*, liv. 2, tit. 1, ch. 2, § 2; *Heffter, Droit International*, §§ 144–146; *Waite, State Papers*, vol. 1, pp. 140, 169–172; *Manning, Law of Nations*, pp. 167, 168; *Ortolan, Diplomatie de la Mer*, tome 2, ch. 4; *Garden, De Diplomatie*, liv. 7, § 1; *Bello, Derecho Internacional*, pt. 2, cap. 7, §§ 1, 2; *Hautefeuille, Des Nations Neutres*, tit. 4, ch. 1; *Pilkin, Civil and Polit. Hist. of U. S.*, vol. 1, ch. 10; *Eggers, Leben von Bernstorff*, 2 ob., pp. 118–195.)

§ 3. States, not parties to a war, have not only the right to remain neutral during its continuance, but to do so conduces greatly to their advantage, as they thereby preserve to their citizens the blessings of peace and commerce. Moreover, the belligerents are interested in maintaining the just rights of neutrals, as the trade and intercourse kept up by them greatly contribute to mitigate the evils of war. It has, therefore, become an established principle of international law, that neutrals shall be permitted to carry on their accustomed trade, with such restrictions only as are necessary for the security of the established rights of the belligerents. Although the neutral state is considered as continuing to occupy toward the belligerents the same general position as before the war, its relations with them are very different; neutrality is not properly a continuation of the former state of peace, (“*la continuation de l’état antérieur de paix* ;”) for, to neutrals, war brings certain advantages and disadvantages, and imposes upon them new and peculiar duties. While, in some respects, their trade and commerce may be increased in extent and profit, it is restricted with respect to blockades and sieges, and the carrying of contraband, and their vessels are subjected to the inconvenience and annoyance of visit and search. Not only are they obliged to maintain strict impartiality toward the belligerents, but they are bound to prevent or punish any violation of their rights of neutrality, by either of the parties at war with each other. These duties of neutrality extend not only to preventing the arming of cruisers in neutral ports, and the enlistment of men in neutral territory, but also to the general sanctity of neutral jurisdiction, by redressing all injuries which one belligerent may commit upon the other within its limits. (*Phillimore, On Int. Law*, vol. 8, §§ 186, 187; *Hubner, De la Saisie des bâti-*

*ments Neutres*, pt. 2, ch. 2, § 2; *Azuni, Droit Maritime*, tome 2, pp. 58, 69; *Massé, Droit Commercial*, tome 1, pp. 177–192; *Tetens, Considerations sur les Droits, etc.*, p. 34; *Ortolan, Diplomatie de la Mer.*, tome 2, ch. 8; *Kent, Com. on Am. Law*, vol. 1, pp. 118, 119; *Wheaton, Elem. Int. Law*, pt. 4, ch. 3, § 7; *Heffler, Droit International*, § 146–150; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 14; *Hautefeuille, Des Nations Neutres*, tit. 4, ch. 1.)

§ 4. The rights of war can be exercised only within the territory of the belligerent powers, upon the high seas, or in territory belonging to no one. Hostilities cannot be lawfully exercised within the territorial jurisdiction of the neutral state which is the common friend of both parties. To grant any such right to one would be a detriment to the other, and to extend the privilege to both would necessarily make the neutral territory the theatre of hostile operations, and involve the state in the consequences of the war. Hence, every voluntary entrance into neutral territory, with hostile purposes, is absolutely unlawful, and the party so trespassing is liable to be treated as an enemy, unless full satisfaction is made for such violation of neutral rights. (*Wheaton, Elem. Int. Law*, pt. 4, ch. 3, § 7; *Kent, Com. on Am. Law*, vol. 1, pp. 118, 119; *Vattel, Droit des Gens*, liv. 3, ch. 7, § 132; *Grotius, de Jur. Bel. ac Pac.*, lib. 2, cap. 2, § 13; *Bynkershoek, Quaest. Jur. Pub.*, lib. 1, cap. 8; *Wolfius, Jus. Gentium*, § 687; *Martens, Precis du Droit des Gens*, §§ 310, 311; *Heffler, Droit International*, §§ 146, 147; *Garden, De Diplomatie*, liv. 7, § 2; *Hautefeuille, Des Nations Neutres*, tit. 6, ch. 1.)

§ 5. It was contended by some of the ancient publicists that a belligerent had an absolute right of passage for his troops through neutral territory, and that the neutral could not refuse it without injustice. But Vattel contends that such *innocent passage* through neutral territory may be granted or refused by the neutral power, at its discretion; that, if refused, the applicant has no cause of complaint, and if granted, the opposite party can only claim the same privilege for his own troops. Many modern writers, and the German publicists generally, have pronounced in favor of the views of Vattel. But Heffler, Hautefeuille, Manning, and others,

express the opinion, that to grant such passage is a violation of neutral duty, and affords just cause of complaint, if not of war, to the other belligerent. This opinion seems most consonant with the general principles of neutrality. But admitting the right of the neutral state to make such agreement, it follows, that if it grant or refuse passage to one of the parties to the war, it is bound, in like manner, to grant or refuse it to all the other parties, unless the alteration of circumstances, or some special reason, should, of itself, form a justification for acting otherwise. Without solid and satisfactory reasons, to grant passage to one belligerent and refuse it to another, would be showing partiality, and receding from a position of strict neutrality. This is the reasonable and just rule deduced from the opinions of law writers, and the usage of nations. The grant of passage, says Vattel, includes all those things without which the passage would not be practicable, such as the liberty of carrying whatever may be necessary for the passing army, and that of maintaining discipline among the troops. Moreover, he who grants a passage is bound, so far as lies in his power, to make it safe from attack; for, otherwise, it would be drawing those who pass into a snare, which would be a breach of good faith. Whether the troops are to pass with or without arms, and whether they are to be permitted to purchase supplies in the country passed over, or to carry their provisions with them, will, in general, be specified in the grant of passage, and if not specified, such permission will be presumed. Troops, to whom a passage is granted through a neutral territory, are bound to observe the most exact discipline, to occasion no damage to the country passed over, to keep the public roads, and not to enter the houses or lands of private persons, and to punctually pay for whatever is purchased of the inhabitants. The state to which the troops belong is held strictly accountable for any damage to public or private property. Moreover, they cannot make the neutral border a shelter for making preparations to attack the enemy, nor, when defeated, an asylum in which to lie by and watch their opportunity for further contest. This would be making the neutral country directly auxiliary to the war, and to the comfort and support of one of the belligerents. Such conduct

would be a violation of the rights and duties of neutrality, and, so far from being justified by the grant of passage, it would be good cause for the neutral state to revoke the grant, and compel the offender to immediately leave its territory. (*Kent, Com. on Am. Law*, vol. 1, pp. 119, 120; *Vattel, Droit des Gens*, liv. 3, ch. 7, §§ 133, 134; *Bello, Derecho Internacional*, pt. 2, cap. 7, §§ 5, 6; *Manning, Law of Nations*, pp. 182, et seq.; *Moser, Versuch, etc.*, b. 10, c. 1, pp. 238, et seq.; *Wheaton, Elem. Int. Law*, pt. 4, ch. 8, § 8; *Kent, Com. on Am. Law*, vol. 1, p. 119; *Grotius, de Jur. Bel. ac Pac.*, lib. 2, cap. 2, § 13; *Manning, Law of Nations*, pp. 182–186; *Wolffius, Jus Gentium*, § 687; *Dumont, Corps Dip.*, liv. 3, ch. 1, § 193; *Wildman, Int. Law*, vol. 1, pp. 64, 65; *Ortolan, Diplomatie de la Mer*, tome 2, ch. 8; *Martens, Precis du Droit des Gens*, § 310; *Moser, Versuch, etc.*, b. 10, ch. 1, §§ 218, 238; *Heffter, Droit International*, § 147; *Hautefeuille, Des Nations Neutres*, tit. 5, ch. 1; *Pando, Derecho Internacional*, p. 461; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 17; *Gattani, De Doveri de Populi Neutrali*, pt. 1, ch. 7.)

§ 6. Bynkershoek makes one exception to the general inviolability of neutral territory, and contends that if a belligerent should be attacked on hostile ground, or in the open sea, and should flee within the jurisdiction of a neutral state, the victor may pursue him *dum ferve opus*, and seize his prize within the neutral state. He rests his opinion entirely on the authority and practice of the Dutch, and not on the usage of any other nation. Casaregis, in one part of his work, expresses the same opinion, and, relying on the practice or law observed in the chase of animals, maintains that if a naval fight has commenced on the high seas, a belligerent may pursue and capture the ship of his enemy, even under the cannon, and within the jurisdiction of a neutral power. But, in a subsequent discourse, he acknowledges his error, or rather forgets his former opinion, and adopts a contrary one with respect to the protection afforded to belligerent vessels in neutral ports. (*Wheaton, Elem. Int. Law*, pt. 4, ch. 3, § 10; *Bynkershoek, Q. J. Pub.*, lib. 1, cap. 8; *Casaregis, de Commercio*, disc. 24, n. 2, and disc. 174, n. 11; *Bello, Derecho Internacional*, pt. 2, cap. 7, § 6; *Heffter, Droit International*, §§ 146, 147; *Kent, Com. on Am. Law*, vol. 1, p. 120; *Manning,*

*Law of Nations*, pp. 184, 386; *Dumont, Corps Dip.*, tome 6, p. 129; *The Anna*, 5 *Rob. Rep.*, p. 348.)

§ 7. But this opinion of Bynkershoek is not supported by the practice of nations, nor by writers on public law. Abreu, Valin, Emerigon, Vattel, Azuni, Sir William Scott, Martens, Phillimore, Manning, and other European writers, maintain the sounder doctrine, that when the flying enemy has entered neutral territory he is placed immediately under the protection of the neutral power, and that there is no exception to the rule that every voluntary entrance into neutral territory, with hostile purposes, is absolutely unlawful. Kent, Wheaton, Story, and other American writers, oppose the doctrine of Bynkershoek; and the government of the United States has invariably claimed the absolute inviolability of neutral territory. (*Abreu, Sobre las Presas*, pt. 1, c. 4, § 15; *Valin, Traité des Prises*, ch. 4, § 3; *Azuni, Droit Maritime*, pt. 1, c. 4, § 1; *Vattel, Droit des Gens*, liv. 3, ch. 7, §§ 132, 133; *The Anna Catharina*, 5 *Rob. Rep.*, p. 15; *Kent, Com. on Am. Law*, vol. 1, p. 120; *Wheaton, Elem. Int. Law*, pt. 4, ch. 3, § 10; *Martens, Précis du Droit des Gens*, §§ 310, et seq.; *Emerigon, Traité des Assurances*, ch. 12, sec. 19; *Phillimore, On Int. Law*, vol. 3, § 154; *Manning, Law of Nations*, pp. 186, 386; *Ortolan, Diplomatie de la Mer.*, tome 2, ch. 8; *Heffter, Droit International*, §§ 146, 147; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 17.)

§ 8. This question was revived and elaborately discussed in the case of the steamboat "Caroline," which was captured and destroyed by British armed forces while in American territory, in the winter of 1838. This vessel had been employed by a body of Canadian insurgents, in conveying passengers and munitions of war from the frontier of the state of New York to the British ground of Navy Island. The commander of the expedition, from the Canada side, sent to capture this vessel, expected to find her within British territory, but on coming round the point of the island in the night, he first discovered that the vessel was moored on the American shore. He nevertheless proceeded to make the capture and to destroy the vessel, although then within the neutral territory, and his conduct was approved by his government. This led to remon-

strance on the part of the United States. It was said, that if, upon a full investigation of all the facts, it should appear that the owner of the vessel had been governed by a hostile intent, or had made common cause with the occupants of Navy Island, the United States would prosecute no claim to indemnity for the destruction of this boat; but that the lawfulness, or unlawfulness of the employment in which the "Caroline" was engaged, however settled, in no manner involved the higher consideration of the violation of territorial sovereignty and jurisdiction. In the discussion which followed, Mr. Webster, while claiming absolute immunity of neutral territory against aggression from either of the belligerents, admitted that the necessity of *self-defense* might justify hostility in the territory of a neutral power; but that it was required of the English government, as the aggressor in this case, "to show *a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation.* It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity and kept clearly within it." Lord Ashburton agreed with Mr. Webster, on the inviolability of neutral or independent territory, and on the possible exception to which that principle was liable—the necessity of self-defense, as the first law of our nature,—and that the suspension of that great principle "must be for the shortest possible period, during the continuance of an admitted overruling necessity, and strictly confined within the narrowest limits imposed by that necessity." He, however, contended that there was "that necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation," which preceded the destruction of the Caroline while moored to the shore of the United States, that "it must be admitted that there was, in the hurried execution of the necessary seizure, *a violation of territory,*" and that it was "to be regretted that some explanation and apology for this occurrence was not immediately made" to the United States, by the British government. These acknowledgments and assurances were received as satisfactory by

the United States, and the subject was not further discussed by the two governments. (*Webster, Dip. and Off. Papers*, pp. 112-120; *Phillimore, On Int. Law*, vol. 3, § 38.)

§ 9. A neutral state, by virtue of its general right of police over its ports, harbors and coasts, may impose such restrictions upon belligerent vessels, which come within its jurisdiction, as may be deemed necessary for its own neutrality and peace, and so long as such restrictions are impartially imposed upon all the belligerent powers, neither can have any right to complain. This right is frequently exercised in prohibiting all armed cruisers with prizes to enter such neutral ports and waters, and, even without prizes, to obtain provisions and supplies. This usage is shown by marine ordinances and text writers of different nations. (*Kent, Com. on Am. Law*, vol. 1, pp. 123, 125; *Bynkershoek, Quæst. Jur. Pub.*, lib. 1, cap. 15; *Manning, Law of Nations*, p. 387; *Heffter, Droit International*, §§ 146-150; *Ortolan, Diplomatie de Mer*, tome 2, ch. 8; *Bello, Droit International*, pt. 2, cap. 7, § 6; *Hautefeuille, Des Nations Neutres*, tit. 6, ch. 2.)

§ 10. This restriction, imposed by neutrals upon the vessels of belligerents which come into their ports, is never extended to deny the rights of hospitality in case of immediate danger and want. Armed cruisers may anchor within a neutral port as a shelter from the attacks of an enemy, to avoid the dangers of a storm, or to supply themselves with water, provisions, and other articles of pressing necessity. Asylum, to this extent, is required by the common laws of humanity, to be afforded to belligerent vessels in neutral ports. But beyond this, there is no right of asylum which the neutral may not withhold equally from all belligerents. It may prevent any free communication with the land, and, as soon as such vessels have supplied their immediate wants, the neutral may compel them to depart from its jurisdiction. Such were the restrictions imposed by the king of the Two Sicilies in the wars of 1740 and 1756, and by Sardinia in the war of 1778, and they are supported by the authority of text-writers. (*Kent, Com. on Am. Law*, vol. 1, pp. 120, 121; *Wheaton, Elem. Int. Law*, pt. 4, ch. 8, § 14; *Bynkershoek, Quæst. Jur. Pub.*, lib. 1, cap. 15; *Manning, Law of Nations*, p. 387; *Heffter, Droit International*, §§ 146-150; *Bello, Derecho*

*Internacional*, pt. 2, cap. 7, §§ 5, 6; *Hautefeuille*, *Des Nations Neutres*, tit. 6, ch. 2; *Ortolan*, *Diplomatie de la Mer*, tome 2, ch. 8.)

§ 11. But while the neutral state may, by proclamation or otherwise, prohibit belligerent vessels with prizes or prisoners of war from entering its ports, the absence of any such prohibition implies the right to enter for the purposes indicated, and any vessel so entering neutral waters, retains her right of ex-territoriality, both with respect to her prisoners of war and her prizes. This question was raised in the port of San Francisco, California, in the case of the Russian vessel, *The Sitka*, a prize of the British navy, during the Crimean war. (*Cushing*, *Opin. U. S. Att'ys Genl.*, vol. 7, p. 123; *Manning*, *Law of Nations*, p. 387; *Loccenius*, *de Jure Maritime*, lib. 2, cap. 4, § 7; *Hubner*, *Saisie de Batiments*, liv. 2, ch. 2, § 8; *Martens*, *Precis du Droit des Gens*, § 312; *Ortolan*, *Diplomatie de la Mer*, tome 2, ch. 8; *Heffter*, *Droit International*, §§ 146-150; *Hautefeuille*, *Des Nations Neutres*, tit. 6, ch. 2.)

§ 12. The armed cruisers of belligerents, while within the jurisdiction of a neutral state, are bound to abstain from any acts of hostility toward the subjects, vessels or other property of their enemies; they cannot increase their guns or military stores, or augment their crews, not even by the enrollment of their own countrymen; they can employ neither force nor stratagem to recover prizes, or to rescue prisoners in the possession of the enemy; nor can they use a neutral port, or waters within neutral jurisdiction, either for the purpose of hindering the approach of vessels of any nation whatever, or for the purpose of attacking those which depart from the ports or shores of neutral powers. No proximate acts of war, such as a ship stationing herself within the neutral line, and sending out her boats on hostile enterprises, can, in any manner, be allowed to originate in neutral territory; nor can any measure be taken that will lead to immediate violence. (*Wheaton*, *Elem. Int. Law*, pt. 4, ch. 3, § 16; *Kent*, *Com. on Am. Law*, vol. 1, p. 118; *Azuni*, *Droit Maritime*, tome 2, ch. 5; *Martens*, *Precis du Droit des Gens*, § 312; *Chitty's Com. Law*, vol. 1, pp. 441-444; *Ortolan*, *Diplomatie de la Mer*, tome 2, ch. 8; *Bello*, *Derecho Internacional*, pt. 2, cap. 7, §§ 5, 6; *Heffter*, *Droit International*, §§ 146-150; *The*



*Twee Gebroeders*, 3 *Rob. Rep.*, p. 163; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 17; *Hautefeuille, Des Nations Neutres*, tit. 6, ch. 1; *De Cussy, Droit Maritime*, liv. 1, tit. 3, § 13.)

§ 13. Publicists make a marked distinction between the duties of neutrals, with respect to the asylum which may be afforded to belligerent ships, and that which may be afforded to belligerent forces on land. This difference, says Heffter, results from the immunity of the flag, and the principle that ships are considered as a portion of the territory of the nation to which they belong. Hence the allowable custom of asylum in neutral waters, and the want of power in the neutral to interfere with internal organization of such vessels, when not armed or equipped within its jurisdiction. On the other hand, troops are not a part of the territory of the nation to which they belong, nor has their flag any immunity on neutral soil. While, therefore, individuals, as such, are entitled, by the laws of humanity, to the right of asylum in neutral territory, such asylum cannot be demanded by, nor can it be granted, without a violation of neutral duty, to an army as a body. It is, consequently, the duty of the neutral to order the immediate disarming of all belligerent troops which enter neutral territory as an asylum, to cause them to release all their prisoners, and to restore all booty which they may bring with them. If he neglect to do this, he makes his own territory the theatre of war, and justifies the other belligerent in attacking such refugees within such territory, which is no longer to be regarded as neutral. (*Heffter, Droit International*, § 149; *Martens, Droit des Gens*, § 807; *Klüber, Droit des Gens*, § 208, note b; *Ortolan, Diplomatie de Mer.*, liv. 3, ch. 8; *Pistoye et Duverdy, Des Prises Maritimes*, tit. 1, ch. 1, sec. 3; *Hautefeuille, Des Nations Neutres*, tit. 6, ch. 2; *Wheaton, Elem. Int. Law*, pt. 4, ch. 3, §§ 6, 7; *Pando, Derecho Internacional*, p. 465; *Bello, Derecho Internacional*, pt. 2, cap. 7, § 5; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 17; *De Steck, Versuch, oeber Handels, etc.*, p. 173; *Putman, De Jure recipiendi hostes, etc.*)

§ 14. At the commencement of the European war, in 1793, the government of the United States took strong grounds against the arming and equipping of vessels within the ports of the United States, by the respective belligerent powers, to

cruise against each other, declaring such acts to be a violation of neutral rights, and positively unlawful; and that any vessel, so armed or equipped in our ports, for military service, was not entitled to the rights of asylum. The authority of Wolfius, Vattel and other writers on the law and usage of nations, were appealed to, in support of these declarations and rules of neutrality. The ground then assumed by the United States is now generally admitted to be correct. The same objection was made by the United States, in the war of 1793, against the enlisting of men by the respective belligerent powers within our ports, and it was declared that if the neutral state might not, consistently with its neutrality, furnish men to either party for their aid in war, it was equally unlawful for either belligerent to enroll them in the neutral territory. Wolfius says that "it is not permitted to raise soldiers on the territory of another, without the consent of its sovereign." Vattel says that, "As the right of levying soldiers belongs solely to the nation or the sovereign, no person must attempt to enlist soldiers in a foreign country, without the permission of the sovereign. \* \* \* The man who undertakes to enlist soldiers in a foreign country, without the sovereign's permission,— and, in general, whoever entices away the subjects of another state, violates one of the most sacred rights of the prince and the nation. This crime is distinguished by the name of kidnapping, or man-stealing, and is punished with the utmost severity in every well regulated state. Foreign recruiters are hanged without mercy, and with great justice. It is not presumed that their sovereign has ordered them to commit a crime, and, even supposing that they had received such an order, they ought not to have obeyed it,— their sovereign having no right to command what is contrary to the law of nature. \* \* \* If it appear that they acted by order, such a proceeding in a foreign sovereign is justly considered as an injury, and as sufficient cause for declaring war against him, unless he make a suitable reparation." (*Wolfius, Jus. Gentium*, § 754; *Vattel, Droit des Gens*, liv. 3, ch. 2, § 15; *Bynkershoek, Quaest. Jur. Pub.*, lib. 1, cap. 22; *Phillimore, On Int. Law*, vol. 3, § 142, et seq.; *Ward, Hist. Law of Nations*, vol. 2, p. 291; *Manning, Law of Nations*, pp. 170, et seq.; *Nelson, Opinions U. S. Att'ys Genl.*, vol. 5, p.

386; *Bello, Derecho Internacional*, pt. 2, cap. 7, § 4; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 11; *Hautefeuille, Des Nations Neutres*, tit. 5, ch. 1; *Heffter, Droit International*, § 149.)

§ 15. The next question to be considered, is, whether neutrals may assist a belligerent by money, in the shape of a loan or otherwise, without violating the duties or departing from the position of neutrality? It seems to be universally conceded, that if such loan be made for the manifest purpose of enabling the belligerent to carry on the war, it would be a virtual concurrence in the war, and consequently a just cause of complaint by the opposite party. But Vattel contends that the loaning of money to one belligerent, by the subjects of a neutral state, is not such a breach of neutrality as to be either a cause of war or of complaint, provided the loan is made for the purpose of getting good interest, and not for the purpose of enabling one belligerent to attack the other. Phillimore very properly regards this as a manifest frittering away of the important duties of the neutral; and that it is as much a violation of neutral duty to furnish the one as the other of the

“ — two main nerves, iron and gold,”

for the equipage and conduct of the war. The English courts have decided that such laws are in violation of international law, and that they will take no notice of, or render any assistance in, any transactions growing out of such loans, unless raised with the special license of the crown. (*Vattel, Droit des Gens*, liv. 3, ch. 7, § 110; *Phillimore, On Int. Law*, vol. 3, § 151; *De Wurtz v. Hendricks*, 9 *Moore Rep.*, p. 586; *Bello, Derecho Internacional*, pt. 2, cap. 7, § 8; *Hautefeuille, Des Nations Neutres*, tit. 5, ch. 1; *Heffter, Droit International*, § 148; *Wolfius, Jus. Gentium*, § 688; *Massé, Droit Commercial*, liv. 2, tit. 1, ch. 2, § 199.)

§ 16. Armed cruisers, in neutral ports, are not only bound not to violate the peace while within neutral jurisdiction, but they cannot use the asylum as a shelter from which to make an attack upon the enemy. Hence, if an armed vessel of one belligerent should depart from a neutral port, no armed vessel, being within the same, and belonging to an adverse belligerent power, can depart until twenty-four hours after the

former, without being deemed to have violated the law of nations. And if any attempt at pursuit be made, the neutral is justified in resorting to force, to compel respect to the sanctity of its neutrality. (*Kent, On Am. Law*, vol. 1, p. 122; *Azuni, Droit Maritime*, tome 2, ch. 5; *Vattel, Droit des Gens*, liv. 3, ch. 7, § 18; *Martens, Précis du Droit des Gens*, §§ 810, et seq.; *Molloy, De Jur. Mar. et Nav.*, lib. 1, cap. 3, § 7; *Ortolan, Diplomatie de la Mer.*, tome 2, ch. 8; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 17; *Hautefeuille, Des Nations Neutres*, tit. 6, ch. 1; *Pistoye et Duverdy, Des Prises Maritimes*, tit. 1, ch. 1, sec. 3; *De Cussy, Droit Maritime*, liv. 1, tit. 3, § 18.)

§ 17. If a belligerent cruiser, in acting offensively, passes over a portion of water within neutral jurisdiction, that fact is not usually considered such a violation of the territory as to invalidate an ulterior capture made beyond it. Permission to pass over territorial portions of the sea is not usually required or asked, because not supposed to result in any inconvenience to the neutral power. For example, in a war between England and Russia, belligerent vessels must pass the *sound* over which Denmark claims and exercises imperial rights. So in a war between France and Russia, armed vessels might be obliged to pass through the neutral waters of the *Dardanelles*; but in neither of these cases would the passage be deemed a violation of neutral rights, nor would a capture by either power be invalidated by the fact of such passage, *animo capiendi*, to the place where his right of capture could be exercised. "Where a free passage," says Sir William Scott, "is generally enjoyed, notwithstanding a claim of territory may exist for certain purposes, no violation of territory is committed, if the party, after an inoffensive passage, conducted in the usual manner, begins an act of hostility in open ground. In order to have an invalidating effect, it must at least be either an *unpermitted* passage over territory where permission is regularly requested, or a passage under permission obtained under false representation and suggestions of the purpose designed. In either of these cases there might be an original malfeasance and trespass that traveled throughout and contaminated the whole, but if nothing of this sort can be objected, I am of opinion that a capture,

otherwise legal, is in no degree affected by a passage over territory in itself otherwise legal and permitted." (*Kent, Com. on Am. Law*, vol. 1, p. 119; *The Twee Gebroeders*, 3 *Rob. Rep.*, p. 354; *Ortolan, Diplomatie de la Mer*, tome 2, ch. 8; *Bello, Derecho Internacional*, pt. 2, cap. 7, § 6; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 17.)

§ 18. Such are the general prohibitions, recognized and established by the laws of nations, against any positive or even approximate acts of war in neutral territory. We are not aware that any modern writer on international law has questioned the soundness of the principle upon which they are founded. Moreover, the extent of a nation's sovereign rights depends, in some measure, upon its municipal laws, and other powers are bound, not only to abstain from violating such laws, but to respect the policy of them. The municipal laws of a state, for the protection of the integrity of its soil and the sanctity of its neutrality, are sometimes even more stringent than the general laws of war; the right of a sovereign state to impose such restrictions and prohibitions, consistent with the general policy of neutrality, as it may see fit, is undeniable. And all acts of the officers of a belligerent power against the municipal law of the neutral state, or in violation of its policy, involves that government in responsibility for their conduct. (*Kent, Com. on Am. Law*, vol. 1, p. 123; *Marcy's Correspondence, etc., on Recruiting*, p. 50; *Valin, Com. sur l'Ordonnance*, t. 2, p. 274; *Ortolan, Diplomatie de la Mer*, tome 2, ch. 8; *Heffler, Droit International*, §§ 149-150; *Hautefeuille, Des Nations Neutres*, tit. 6, ch. 1; *Azuni, Droit Maritime*, tome 2, ch. 5.)

§ 19. The congress of the United States have, by statutes, made suitable provision for the support and due observance of the rules of strict neutrality within American territorial jurisdiction. By the law of June 5th, 1794, revised April 20th, 1818, it is declared to be a misdemeanor for any citizen of the United States, within the territory or jurisdiction thereof, to accept and exercise a commission to serve a foreign prince, state, colony, district, or people, in war, by land or by sea, against any prince, state, colony, district or people, with whom the United States are at peace, or to enlist, or enter himself, or hire or retain another person to

enlist, or enter himself, or to go beyond the limits or jurisdiction of the United States, with intent to be enlisted or entered in the service of any foreign prince, state, etc.; or to fit out and arm, or to increase and augment the force of any armed vessel, with the intent that such vessel be employed in the service of any foreign power at war with another power, with whom we are at peace; or to begin, set on foot, or provide, or prepare, the means for any military expedition, or enterprise, against the territory of any foreign prince, or state, or of any colony, district, or people, with whom we are at peace. And any vessel, or vessels, fitted out for such purpose is made subject to forfeiture. The President of the United States is also authorized to employ force to compel any foreign vessel to depart, which, by the law of nations, or by treaty, ought not to remain within the United States, and to employ the public force generally in enforcing the observance of the duties of neutrality prescribed by law. (*Kent, Com. on Am. Law*, vol. 1, p. 123; *Wheaton, Elem. Int. Law*, pt. 4, ch. 3, § 17; *U. S. Statutes at Large*, vol. 1, p. 381; vol. 3, p. 447; *Dunlop, Laws of the United States*, pp. 580–583; *The Gran Para*, 7 *Wheaton Rep.*, p. 489; *The United States v. Quincy*, 6 *Peters Rep.*, pp. 445–467; *The Alerta*, 9 *Cranch. Rep.*, p. 364; *The Estrella*, 4 *Wheaton Rep.*, p. 309; *Legare, Opinions U. S. Att'ys Genl.*, vol. 3, pp. 738, 741; *Johnson, Id.*, vol. 5, p. 92.)

§ 20. The example of the United States was followed by Great Britain, and the act of 59 George III., chapter sixty-nine, commonly called the foreign enlistment act, was passed, supplying the defect of former laws, and extending the prohibition to those who entered the service of unacknowledged, as well as acknowledged, states. The previous statutes of 9 and 29 George II., which were enacted for the purpose of preventing the formation of Jacobite armies in France and Spain, annexed capital punishment as for a felony, to the offense of entering the service of a foreign state. The foreign enlistment act of 1819, provided a less severe punishment, and introduced after the words “king, prince, state, or potentate,” the words, “colony or district assuming the powers of government.” This act was thoroughly discussed in parliament in 1823, on a motion for its repeal. (*Kent*,

*Com. on Am. Law*, vol. 1, p. 123; *Wheaton, Elem. Int. Law*, pt. 4, ch. 3, § 17; *Annual Register*, vol. 51, p. 71; *Canning's Speeches*, vol. 4, p. 151; *Phillimore, On Int. Law*, vol. 3, § 146; *Alison, Hist. of Europe*, second series, ch. 4, §§ 96, et seq.)

§ 21. It is not only the right of the neutral state to protect the property of the belligerents, when within the neutral jurisdiction, but it is a part of the duty of neutrality to defend such property while under neutral protection, and to punish any and every offense against the rights of neutrality, even, if necessary, by a resort to force. Livy relates that Syphax enforced peace between the Carthaginian and Roman galleys while lying in a neutral port. The Venetians prevented the Greeks from attacking the Turks in the neutral port of Chalcocondylas. The same may be said of the Venetians and Turks at Tunis, of the Pisans and Genoese in Sicily, and numerous other cases mentioned in history. The Dutch East India fleet having put into Bergen, in Norway, in 1666, to avoid the English, were attacked by them; but the governor of Bergen fired on the assailants, and the court of Denmark complained to the English government of the violation of its sovereignty. England having declared her neutrality between Don Miguel and Donna Maria, in 1828, sent a naval force to intercept the Portuguese armament in its destination to the island Terceira, because it had been fitted out in disguise, and had sailed from Plymouth. It is a well established principle of the law of nations that if the property of belligerents, when within the neutral jurisdiction, be attacked, or any capture made, the neutral is bound to redress the injury and effect restitution. In the year 1798, the British ship *Grange* was captured in Delaware bay by a French frigate, and, upon due complaint, the American government caused the British ship to be promptly restored. So, in the case of *The Anna*, captured by a British cruiser in 1805, near the mouth of the Mississippi, and within the jurisdiction of the United States, the British court of admiralty not only restored the captured property, but fully asserted and vindicated the sanctity of neutral territory by a decree of costs and damages against the captor. If a neutral state neglects to make such restitution, and to enforce the sanctity of its territory, but tamely submits to the outrages of one of

the belligerents, it forfeits the immunities of its neutral character with respect to the other, and may be treated by it as an enemy. (*Phillimore, On Int. Law*, vol. 3, §§ 155–157; *Kent, Com. on Am. Law*, vol. 1, pp. 117, 118; *Chitty, Law of Nations*, p. 150; *The Vrow Anna Catharina*, 5 *Rob. Rep.*, p. 15; *The Anna*, 5 *Rob. Rep.*, p. 348; *Heffter, Droit International*, §§ 146–150; *Bello, Derecho Internacional*, pt. 2, cap. 7, § 6; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 17; *Hautefeuille, Des Nations Neutres*, tit. 4, ch. 1; *De Cussy, Droit Maritime*, liv. 1, tit. 3, § 13.)

§ 22. Although it is the duty of a belligerent state to make restitution of the property captured within the territorial jurisdiction of a neutral state, yet it is a technical rule of the prize court to restore to the individual claimant, in such a case, only on the application of the neutral government whose territory was violated in effecting the capture. This rule is founded upon the principle, that the neutral state alone has been injured by the capture, and that the hostile claimant has no right to appear, for the purpose of suggesting the invalidity of the capture. He must look to the neutral government for redress of the violation of the right of asylum, and that government is bound to effect a restitution, or procure indemnity for the injury suffered. This claim is usually preferred by the ambassador of the neutral state in the captor's country, to the prize court before which the captured property is brought for adjudication. (*Phillimore, On Int. Law*, vol. 3, § 158; *Wheaton, Elem. Int. Law*, pt. 4, ch. 3, § 11; *The Etrusco*, 3 *Rob. Rep.*, p. 31, note; *The Anne*, 3 *Wheaton Rep.*, p. 447; *The Gen. Armstrong*, *Ex. Doc. No. 53*, *H. R.*, 32d *Cong.*, 1st *Sess.*; *No. 24*, *Senate*, 2d *Sess.*; *Revue Etr. et Fr.*, tome 7, p. 751.)

§ 23. But if the property captured in violation of neutral rights comes into the possession of the neutral state, it is the right and duty of such state to restore it to its original owners. This restitution is generally made through the agency of the courts of admiralty and maritime jurisdiction. Traces of the exercise of such a jurisdiction are found in the history of English jurisprudence as early as the reigns of Charles II. and James II., and are now matters of ordinary occurrence in English and American courts of admiralty. Such restitu-



tion is not confined to captures within neutral jurisdiction, but extends to all captures made in violation of neutral rights, such as by vessels which had been armed and equipped, or had received military munitions, or had enlisted men, or in any other way had violated the sanctity of neutral territorial jurisdiction. (*Wheaton, Elem. Int. Law*, pt. 4, ch. 8, § 12; *Life and Works of Sir L. Jenkins*, vol. 2, p. 727; *Phillimore, On Int. Law*, vol. 3, § 158; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 17.)

§ 24. The power and duty of the United States to restore captures made in violation of our neutral rights and brought into American ports, have never been matters of question; but, in the constitutional arrangement of the different authorities of the American federal union, doubts were at first entertained, whether it belonged to the executive government, or to the judiciary, to perform the duty of inquiry into captures made in violation of American sovereignty, and of making restitution to the injured party. But it has long since been settled that this duty appropriately belongs to the federal tribunals, acting as courts of admiralty and maritime jurisdiction. It, however, has been judicially determined that this peculiar jurisdiction of the courts of the neutral government to inquire into the validity of captures made in violation of the neutral immunity, will be exercised only for the purpose of restoring the specific property, when voluntarily brought within the territory, and does not extend to the infliction of vindictive damages, as in ordinary cases of maritime injuries, and as is done by the courts of the captor's own country. The punishment to be imposed upon the party violating the municipal statutes of the neutral state, is a matter to be determined in a separate and distinct proceeding. The court will exercise jurisdiction, and decree restitution to the original owner, in case of capture from a belligerent power, by a citizen of the United States, under a commission from another belligerent power, such capture being a violation of neutral duty; but they have no jurisdiction on a libel for damages for the capture of a vessel as prize by the commissioned cruiser of a belligerent power, although the vessel belong to citizens of the United States, and the capturing vessel and her commander be found and proceeded against

within the jurisdiction of the court. (*Wheaton, Elem. Int. Law*, pt. 4, ch. 3, §§ 12, 13; *The United States v. Peters*, 3 *Dallas Rep.*, pp. 121–131; *The Divina Pastora*, 4 *Wheaton Rep.*, p. 65, note; *The Amistad de Rues*, 5 *Wheaton Rep.*, p. 385; *The Arrogante Barcelones*, 7 *Wheaton Rep.*, p. 519; *La Nereyda*, 8 *Wheaton Rep.*, p. 108; *The Fanny*, 9 *Wheaton Rep.*, p. 658; *The Santissima Trinidad*, 7 *Wheaton Rep.*, p. 283; *Glass v. The Betsey*, 3 *Dallas Rep.*, p. 65, note a; *McDonough v. The Mary Ford*, 3 *Dallas Rep.*, p. 188; *Waite, State Papers*, vol. 6, p. 195.)

§ 25. In the case of capture by an armed vessel, fitted out in the ports of the United States, in violation of our neutrality, the claim by an alleged *bonae fidei* purchaser in a foreign port was rejected, and restitution decreed to the original owners. It, however, was decided that a *bonae fidei* purchaser, without notice, in such a case is entitled to be reimbursed the freight which he may have paid upon the captured goods; and that an innocent neutral carrier of such goods, the same having been shipped in a foreign port, is entitled to freight out of the goods. (*Wheaton, Elem. Int. Law*, pt. 4, ch. 3, § 14; *Kent, Com. on Am. Law*, vol. 1, p. 123; *The Santissima Trinidad*, 7 *Wheaton Rep.*, p. 283; *The Fanny*, 9 *Wheaton Rep.*, p. 658.)

§ 26. If such property, captured in violation of neutral immunity, be carried *infra praesidia* of the captor's country, and there regularly condemned in a competent court of prize, the question arises whether the courts of the neutral state will exercise jurisdiction, and restore such property to the original owners. If the property be found in the hands of the original wrongdoer, it will be restored by the court, notwithstanding a valid sentence of condemnation, properly authenticated. The offender's touch is said to restore the taint from which the condemnation may have purified the prize, and it is not for him to claim a right springing out of his own wrong. (*Wheaton, Elem. Int. Law*, pt. 4, ch. 3, § 14; *The Arragante Barcelones*, 7 *Wheaton Rep.*, p. 496; *The Amistad de Rues*, 5 *Wheaton Rep.*, p. 390.)

§ 27. Illegal equipment and outfit, in violation of neutral immunity, will not effect the validity of captures made after

the cruise, to which the outfit had been applied is actually terminated. The offense is deemed to be deposited at the termination of the voyage, and does not effect future transactions. This rule would result from analogy to other cases of violation of public law, and has been directly announced by the U.S. supreme court. (*Kent, Com. on Am. Law*, vol. 1, p. 123; *Wheaton, Elem. Int. Law*, pt. 4, ch. 3, § 13; *The Santissima Trinidad*, 7 *Wheaton Rep.*, p. 348.)

## CHAPTER XXIII.

### LAW OF SIEGES AND BLOCKADES.

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§ 1. The same law which confers upon belligerents the right to capture and destroy each others property, imposes

upon neutrals the obligation not to interfere with the proper exercise of this right. Although as a general rule, neutrals may continue their accustomed trade and intercourse with either, or both of the parties to a war, there are, as already remarked, certain exceptions to this rule, established by the positive law of nations, one of which is, that the neutral shall not communicate or carry on trade with a place or post which is besieged or blockaded. Grotius considers the carrying of supplies to a besieged town or a blockaded port, as an offense exceedingly aggravated and injurious; Bynkershoek thinks the prohibition is founded on natural reason as well as established usage; both agree that a neutral so offending, may be severely dealt with; Vattel says that he may be treated as a public enemy. The views of these distinguished founders of international law are fully concurred in by the opinions of modern publicists, and by the prize courts of all countries. The right of a belligerent to invest the places and ports of an enemy so as to entirely exclude the commerce, (otherwise lawful,) of neutrals, during the continuance of the investment is undoubted, and, however serious the grievance, it is one to which neutral governments and their subjects are bound to submit. But as this right of the belligerent is an exception to the general rights of neutrals, and bears with great severity upon their interests, its exercise is always watched with peculiar jealousy in order to prevent its necessary evils from being aggravated by a lax construction of the laws which regulate its application. (*Hautefeuille, Des Nations Neutres*, tit. 9, ch. 1, sec. 1; *Heffler, Droit International*, § 154; *Grotius, de Jur. Bel. ac Pac.*, lib. 3, cap. 1, § 5; *Bynkershoek, Quaest. Jur. Pub.*, lib. 1, cap. 11; *Vattel, Droit des Gens*, liv. 3, ch. 7, § 117; *Wheaton, Elem. Int. Law*, pt. 4, ch. 3, § 28; *Kent, Com. on Am. Law*, vol. 1, p. 148; *Duer, On Insurance*, vol. 1, p. 644; *Phillimore, On Int. Law*, vol. 3, § 285; *Manning, Law of Nations*, p. 319; *Ortolan, Diplomatie de la Mer*, tome 2, ch. 9; *Pistoye et Duverdy, Traité des Prises*, tit. 6, ch. 2, sec. 2; *The Juffrow Maria Schroeder*, 3 *Rob. Rep.*, p. 147; *The Haabet*, 6 *Rob. Rep.*, p. 58; *The Henrick and Maria*, 1 *Rob. Rep.*, p. 147; *Bello, Derecho Internacional*, pt. 2, cap. 8, § 5; *De Cussy, Droit Maritime*, liv. 1, tit. 3, § 11.)

§ 2. The institution of a seige, or blockade, is a high act of sovereignty, and must proceed, either directly from the

government of the state or from some officer to whom the authority has been expressly or impliedly delegated. The general of an army, or the commander of a fleet, in a foreign country, or on a distant station, may be reasonably presumed to carry with him this authority, as the exigencies of the service on which he is employed, under the varying circumstances of the war, would often seem to require its exercise. His authority in such cases, is, therefore, implied from the nature of the service. But where the station of the army or fleet is so near the government of the belligerent state as to enable the commander to receive direct and special instructions, it would seem that the necessity of presuming power in the officer does not exist, and it has been suggested by some, that it is the duty of the commander, in such a case, if his authority should be questioned, to justify his acts by express proof of the instructions of his government. The weight of authority, however, is in favor of the rule that a neutral individual is never at liberty to impeach the regularity of a siege or blockade, otherwise valid, by questioning the authority of the officer by whom it was established or is enforced. The officer is undoubtedly answerable to his own government, for any irregular or unauthorized acts, but so long as they are acts of legitimate hostility, it is not open to a neutral state or its subjects, under any circumstance, to dispute their validity. The orders of his government are known only to that government and the officer, and cannot be inquired into by third parties. If he has acted without orders, and his acts are subsequently adopted and ratified, such ratification supplies the want of an original authority, and precludes all further inquiry. But if the act is disavowed by the government of the belligerent state, or if it can be proved that the officer exceeded his actual authority, such disavowal or excess may be urged as a valid defense. Where a blockade has been declared by the government, the commander of the blockading squadron has no discretionary power to extend its limits; and if he prohibits neutral ships from entering ports not embraced in the terms of the blockade he was appointed to enforce, the waruing is illegal, and no penalty is incurred by the neutral master by whom it is disregarded. (*Wildman, Int. Law*, vol. 2, pp. 178, 179; *Duer, On Insurance*, vol. 1, p.

646; *The Henrick and Maria*, 1 Rob. Rep., p. 146; *The Rolla*, 6 Rob. Rep., p. 366; *Phillimore, On Int. Law*, vol. 3, § 288; *The Juffrow Maria Schroeder*, 3 Rob. Rep., p. 154; *Cameron v. Kyte*, 3 Knapp. Rep., p. 342; *Chitty, Law of Nations*, p. 259; *Heffter, Droit International*, § 154; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 18; *Bello, Derecho Interuacional*, pt. 2, cap. 8, § 5.)

§ 3. A *seige* is a military investment of a place, so as to intercept, or render dangerous, all communications between the occupants and persons outside of the besieging army; and the place is said to be *blockaded*, when such communication, by water, is either entirely cut off or rendered dangerous, by the presence of the blockading squadron. A place may be both besieged and blockaded at the same time, or its communication by water may be intercepted, while those by land may be left open, and *vice versa*. Both are instituted by the rights of war, and for the purpose of injuring the enemy, and both impose upon neutrals the duty of not interfering with the operations of the belligerents. But there is an important distinction, with respect to neutral commerce, between a maritime blockade and a military siege. The object of a blockade is solely to distress the enemy, intercepting his commerce with neutral states. It does not, generally, look to the surrender or reduction of the blockaded port, nor does it necessarily imply the commission of hostilities against the inhabitants of the place. The object of a military siege is, on the other hand, to reduce the place by capitulation, or otherwise, into the possession of the besiegers. It is by the direct application of force, that this object is sought to be attained, and it is only by forcible resistance that it can be defeated. Hence, every besieged place is, for the time, a military post; for even when it is not defended by a military garrison, its inhabitants are converted into soldiers by the necessities of self-defense. This distinction is not merely nominal, but, as will be shown hereafter, leads to important consequences in determining the rights of neutral commerce, and in deciding questions of capture. (*Duer, On Insurance*, vol. 1, p. 657; *Bynkershoek, Quaest. Jur. Pub.*, lib. 1, cap. 11; *The Stert*, 4 Rob. Rep., p. 66; *Kluber, Droit*

*des Gens Moderne*, § 297; *Heffter, Droit International*, § 154; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 18.)

§ 4. It is now a well settled principle of international jurisprudence, that a lawful maritime blockade of a port, requires the actual presence of the blockading force. A mere proclamation or notification of one belligerent, that such a port of the other belligerent will be blockaded at such a time, and thus closed to neutral commerce, is not sufficient to constitute a legal blockade; the force must be actually present at the entrance to the port, or sufficiently near to prevent communication. Nor is the mere presence of a hostile force sufficient, of itself, to make the blockade a legal one; it must not only be actually present, but it must be large enough to prevent communication, or, at least, to render it dangerous to attempt to enter the port. (*Kent, Com. on Am. Law*, vol. 1, p. 144; *Duer, On Insurance*, vol. 1, pp. 647, 648; *Grotius, de Jur. Bel. ac Pac.*, lib. 3, cap. 1, § 5; *Manning, Law of Nations*, pp. 322, 323; *Bynkershoek, Quaest. Jur. Pub.*, lib. 1, cap. 11; *Wheaton, Elem. Int. Law*, pt. 4, ch. 3, § 28; *Phillimore, On Int. Law*, vol. 3, § 289; *The Betsy*, 1 *Rob. Rep.*, p. 92; *The Mercurius*, 1 *Rob. Rep.*, pp. 82, 83; *The Vrouw Judith*, 1 *Rob. Rep.*, p. 150; *Ortolan, Diplomatie de la Mer*, tome 2, ch. 9; *Heffter, Droit International*, § 154, *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 18; *Bello, Derecho Internacional*, pt. 2, cap. 8, § 5; *Hautefeuille, des Nations Neutres*, tit. 9, ch. 1; *De Cussy, Droit Maritime*, liv. 1, tit. 3, § 11.)

§ 5. The only exception to the general rule which requires the actual presence of an adequate force to constitute a legal blockade, is the temporary absence of the blockading squadron produced by accident, as in the case of a storm. Such accidental removal of blockading force, if it be only for a very short time, does not suspend the legal operation of the blockade, and an attempt to take advantage of such an accidental removal, is regarded as a fraudulent attempt to break the blockade. But if the blockading forces should be so scattered or injured by the storm, as to be unable to resume their stations without repairs, and within a reasonable time, the blockade will be considered as terminated, in the same manner as if the blockading squadron had been driven away by a superior force of the enemy. Some ports are subject to



such periodical storms during one or more months of each year, that any blockading squadron is obliged to leave its station, and seek refuge in some other harbor till the seasons of storms is passed. In such cases the legal operation of the blockade is suspended. It should be remembered, however, that some text-writers do not admit this exception of the temporary and accidental absence of the blockading force. They say that the blockade is not mere theory, but the material result of a material fact, (*resultat materiel d'un fait materiel*,) and, consequently, cannot exist in the absence of that fact. That, therefore, the blockade must be regarded as raised the moment the blockading force is removed, no matter whether the absence is for a long or short period, or whether produced by accident, by storm, or by an opposing force. (*Wildman, Int. Law*, vol. 2, p. 181; *Wheaton, Elem. Int. Law*, pt. 4, ch. 8, § 28; *Kent, Com. on Am. Law*, vol. 1, p. 145; *Duer, On Insurance*, vol. 1, p. 651; *The Columbia*, 1 Rob. Rep., p. 154; *The Triheten*, 6 Rob. Rep., p. 65; *The Hoffnung*, 6 Rob. Rep., p. 116; *The Frederick Molka*, 1 Rob. Rep., p. 73; *The Juffrow Maria*, *Schroeder*, 3 Rob. Rep., p. 155; *Radcliff v. U. Ins. Co.*, 7 Johns. Cases, p. 38; *Phillimore, On Int. Law*, vol. 3, § 294; *Laing v. U. Ins. Co.*, 2 Johns. Cases, p. 178; *Ortolan, Diplomatie de la Mer*, tome 2, ch. 9; *Biquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 18; *Bello, Derecho Internacional*, pt. 2, cap. 8, § 5; *Hautefeuille, Des Nations Neutres*, tit. 9, ch. 1, sec. 2.)

§ 6. A *constructive*, or, as it is sometimes called, a *paper blockade*, is one established by proclamation, without the actual presence of an adequate force to prevent the entrance of neutral vessels into the port or ports so pretended to be blockaded. In other words, it is an attempt on the part of one belligerent, by mere proclamation and without possessing, or if possessing, without using the means of establishing a real blockade, to close the port or ports of the opposite belligerent to neutral commerce. Can such fictitious or paper blockades render criminal the entrance of neutral vessels into ports so proclaimed to be, but not actually, blockaded? If so, a mere paper proclamation is equally as efficacious in war as the largest and most powerful fleets. (*Wheaton, Elem. Int. Law*, pt. 4, ch. 2, § 28; *Kent, Com. on Am. Law*, vol. 1, p. 145; *Phillimore, On Int. Law*, vol. 3, §§ 321, 167;

*Wildman, Int. Law*, vol. 2, p. 179; *The Betsey*, 1 *Rob. Rep.*, p. 92; *The Mercurius*, 1 *Rob. Rep.*, p. 84; *Ortolan, Diplomatie de la Mer*, tome 2, ch. 9; *Reddie, Researches, Historical, etc.*, vol. 2, p. 16; *Pistoye et Duverdy, Traité des Prises*, tit. 6, ch. 2, sec. 2; *Heffter, Droit International*, § 157; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 18; *Bello, Derecho Internacional*, pt. 2, cap. 8, § 5; *Hautefeuille, des Nations Neutres*, tit. 9, ch. 5, sec. 1; *De Cussy, Droit Maritime*, liv. 1, tit. 3, § 11.)

§ 7. The ancient text-writers all agree, that a blockade which does not really exist, but is merely declared by proclamation, is not sufficient to render commercial intercourse unlawful on the part of neutrals. Grotius forbids the carrying of anything to "a town actually invested, or a port closely blockaded;" and Bynkershoek evidently concurred with Grotius, in requiring a strict and actual siege or blockade, such as where a town is actually invested with troops or a port closely blockaded by ships of war, (*oppidum obsessum, portus clausos.*) This is shown from his remarks upon the various decrees of the states-general. The general practice of the continental powers accorded with the opinions of these writers. In the convention of 1801, between Great Britain and Russia, intended as a final adjustment of the disputed points of maritime law which had given rise to the armed neutrality of 1780 and 1801, the general law of nations as to what constitutes a blockade, is very correctly expressed. The third article, section fourth, of that convention, declares: "That in order to determine what characterizes a blockaded port, that denomination is given *only where there is*, by the disposition of the power which attacks it with ships stationary or sufficiently near, *an evident danger in entering.*" The same definition of a blockade is implied in the previous treaties between Great Britain and the Baltic powers, and in that of 1794, with the United States. In 1804, instructions were sent by the board of admiralty to the naval commanders and judges of the vice-admiralty courts, not to consider any blockade of the French West India islands as existing, unless in respect to particular ports which were *actually invested*. (*De Cussy, Droit Maritime*, liv. 1, ch. 7; *Wheaton, Hist. Law of Nations*, pp. 138-143; *Wheaton, Elem. Int. Law*, pt. 4, ch. 3, § 28; *Grotius, de Jur. Bel ac Pac.*, lib. 3, cap. 1, § 5; *Byn-*

*kershoek, Quaest. Jur. Pub.*, lib. 1, cap. 11; *The Mercurius*, 1 Rob. Rep., p. 84; *Heffter, Droit International*, § 157; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 18; *Bello, Derecho Internacional*, pt. 2, cap. 8, § 5; *Hautefeuille, Des Nations Neutres*, tit. 9, ch. 5, sec. 1.)

§ 8. But in the course pursued by the belligerents in the wars of the French revolution and empire, and in the British orders in council, and Napoleon's retaliatory decrees, an attempt was made by England and France to annul the well established rule of blockades, and to close the ports and coasts of a whole state to neutral commerce, by simple proclamations, and without the slightest pretense of an actual blockading force. The United States constantly protested against this proceeding, and contended for the rule of international law as laid down by text-writers, that no port or coast could be regarded as blockaded without the actual presence of a sufficient force to prevent, or at least to render dangerous, any attempt of the neutral to enter. It is not necessary to here repeat the various discussions which grew out of these events, as the powers which then attempted to establish this new and absurd rule of international law, have now entirely abandoned such pretensions. (*Wheaton, Hist. Law of Nations*, pp. 372-388; *Kent, Com. on Am. Law*, vol. 1, p. 145; *Phillimore, On Int. Law*, vol. 3, §§ 167, 321; *Martens, Causes célèbres*, tome 2, p. 35; *Pando, Derecho Internacional*, p. 519; *Heffter, Droit International*, § 157; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 18; *Bello, Derecho Internacional*, pt. 2, cap. 8, § 5; *Hautefeuille, Des Nations Neutres*, tit. 9, ch. 5, sec. 1; *De Cussy, Droit Maritime*, liv. 2, ch. 26.)

§ 9. At the commencement of the war between the allies and Russia, in 1854, France and England declared their intention to "maintain the right of a belligerent to prevent neutrals from breaking any *effective* blockade which may be established with an *adequate* force against the enemy's ports, harbors, or coasts." This declaration was a virtual concession on the part of these powerful maritime nations of the illegality of constructive or paper blockades, for which they had formerly contended; but it was regarded as defective, in not further defining what should constitute an *effective* blockade, or an *adequate* blockading force. Moreover, the decla-

ration was in form a mere temporary order, and not as a recognized and subsisting law of nations. But the declaration of the plenipotentiaries of France, Great Britain, Russia, Austria, Prussia, Sardinia and Turkey, on the 16th of April, 1856, at the conference of Paris, removed all doubt on this point, by announcing in the fourth proposition or principle, that "Blockades, in order to be binding, must be effective; that is to say, *maintained by a force sufficient really to prevent access to the coast of the enemy.*" This proposition was approved by the United States, and has been adopted by the other nations of Europe. There is, therefore, very little danger of its ever again being disputed as an established principle of international jurisprudence. (*Phillimore, On Int. Law.*, vol. 3, appendix, pp. 850, 851; *Ortolan, Diplomatie de la Mer.*, tome 2, appendice special; *Pistoye et Duverdy, Traite des Prises*, tit. 6, ch. 5, sec. 2; *Heffter, Droit International*, § 157; *De Cussy, Precis Historique*, ch. 12.)

§ 10. Blockades are divided, by English and American publicists, into two kinds: 1st, a simple or *de facto* blockade, and 2d, a public or governmental blockade. This is by no means a mere nominal distinction, but one that leads to practical consequences of much importance. In cases of capture, the rules of evidence which are applicable to one kind of blockade, are entirely inapplicable to the other; and what a neutral vessel might lawfully do in case of a simple blockade, would be sufficient cause for condemnation in case of a governmental blockade. A simple or *de facto* blockade is constituted merely by the fact of an investment, and without any necessity of a public notification. As it arises solely from facts, it ceases when they terminate; its existence must, therefore, in all cases, be established by clear and decisive evidence. The burthen of proof is thrown upon the captors, and they are bound to show that there was an actual blockade at the time of the capture. If the blockading ships were absent from their stations at the time the alleged breach occurred, the captors must prove that it was accidental, and not such an absence as would dissolve the blockade. A *public*, or governmental blockade, is one where the investment is not only actually established, but where also a public notification of the fact is made to neutral powers by the



commercial intercourse. (*Wheaton, Elem. Int. Law*, pt. 4, ch. 3, § 28; *The Triheten*, 6 Rob. Rep., p. 65; *The Hoffnung*, 6 Rob. Rep., pp. 112–117; *Williams v. Smith*, 2, N. Y. R., p. 1; *Duer, On Insurance*, vol. 1, p. 653; *Wildman Int. Law*, vol. 2, p. 183; *Ortolan, Dip. de la Mer*, tome 2, ch. 9; *Phillimore, On Int. Law*, vol. 3, § 294; *Heffter Droit International*, § 155; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 18; *Bello, Derecho Internacional*, pt. 2, cap. 8, § 5.)

§ 12. A blockade is dissolved by the removal of the blockading force for a different service, although the removal should be a temporary one. Even where only a portion of the force is ordered away, the legal effect is the same, unless the force that is left is competent, by itself, to maintain and enforce the blockade, by its ability to prevent all communications. But the blockade is not considered as raised where some of the passes of communications are left unguarded and open by the temporary absence of some of the ships in chasing suspicious vessels which had approached the blockaded port; for the service in which such ships are employed is a necessary part of the duty they are appointed to perform, and their absence is justly regarded as accidental, like that produced by stress of weather; they, however, are bound to resume their station with due diligence, as otherwise their prolonged absence would lead to the inference that they had been detached as cruisers, and the blockade be considered as suspended. (*Wheaton, Elem. Int. Law*, pt. 4, ch. 3, § 28; *The Nancy*, 1 Act. Rep., p. 57; *The Eagle*, 1 Act. Rep., p. 68; *Duer, On Insurance*, vol. 1, p. 654; *Wildman, Int. Law*, vol. 2, p. 182; *Ortolan, Dip. de la Mer*, tome 2, ch. 9; *Phillimore, On Int. Law*, vol. 3, § 294; *The Rolla*, 6 Rob. Rep., p. 372; *The Fox and others*, 1 Edw. Rep., p. 321; *Pistoye et Duverdy, Traité des Prises*, tit. 6, ch. 2, sec. 2; *Heffter, Droit International*, § 155; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 18; *Bello, Derecho Internacional*, pt. 2, cap. 8, sec. 5.)

§ 13. A blockade is also dissolved by repeated instances of an improper relaxation of the application of the blockading force to the purposes intended. The mere presence of an adequate force is not sufficient to constitute and maintain a blockade, but its application must be constant and uniform,



*Elem. Int. Law*, pt. 4, ch. 3, § 28; *Duer, On Insurance*, vol. 1, p. 655; *The Neutralitet*, 3 Rob. Rep., p. 295; *The Stert*, 4 Rob. Rep., p. 65; *The Jonge Pieter*, 4 Rob. Rep., p. 83; *The Ocean*, 3 Rob. Rep., p. 297; *The Maria*, 6 Rob. Rep., p. 201; *The Charlotte Sophia*, 6 Rob. Rep., p. 204, note; *Heffler, Droit International*, § 155; *Jacobsen, Seerecht, etc.*, p. 683; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 18; *Bello, Derecho Internacional*, pt. 2, cap. 8, § 5.)

§ 15. It might be inferred, by parity of reasoning, that, when a port is under a military siege, neutral commerce might still be lawfully carried on by sea, through channels of communication which could not be obstructed by the forces of the besieging army. But such inference would not be strictly correct, for the difference between a blockade and a siege, in their character and object, have led to a difference in the rules applicable, in the two cases, to neutral commerce. Although the legal effect of a siege on land, that is, a purely military investment of a naval or commercial port, may not be an entire prohibition of neutral commerce, yet it does not leave the ordinary communications by sea open and unrestricted, as a purely maritime blockade leaves the interior communications by land. The primary object of a blockade is, as we have already said, to prohibit commerce; but the primary object of a siege is, the reduction of the place. All writers on international law impose upon neutrals the duty of not interfering with this object. To supply the inhabitants of the place besieged with anything required for immediate use, such as provisions and clothing, might be giving them aid to prolong their resistance. It is, therefore, a clear departure from neutral duty to furnish supplies, even of possible utility, to a port in a state of siege, although the communication by sea may be open. It would be a direct interference in the war, tending to the relief of one belligerent, and to the prejudice of the other; and such supplies are justly deemed contraband of war, to the same extent as if destined to the immediate use of the army or navy of the enemy. Hence, although the prohibition of neutral commerce with a port besieged be not entire, yet it will extend to all supplies of even possible utility in prolonging the siege. (*Duer, On Insurance*, vol. 1, pp. 656-658; *Bynkershoek, Quaest. Jur. Pub.*,



No. 1, cap. 11: *Vattel, Droit des Gens*, liv. 3, ch. 7, § 117; *Heffter, Droit International*, § 155.)

§ 13. The breach of a blockade is viewed, in all cases, as a criminal act: this necessarily implies a criminal intent, and to constitute such intent a knowledge of the existence of the blockade, and an intention to violate it, are indispensable. These are sometimes a presumption of law which the party is not permitted to repel, in others, an inference more or less probable, but, in many cases, they must be shown by positive evidence. Sometimes one will be presumed, while the other will require positive proof. Although both knowledge and intention must be combined to complete a criminal intent, it is evident that the questions themselves are perfectly distinct, and, in any particular case, may be governed by different rules of evidence. The judicial decisions in England, and in the United States, have given great precision to the rules of law applicable to a breach of blockade, by the clearness of their reasoning, and the equity of their illustrations. They are distinguished, likewise, for general coincidence and harmony in their principles. (*Heffter, Droit International*, § 156; *Wheaton, Elem. Int. Law*, pt. 4, ch. 3, § 28; *Kent, Com. on Am. Law*, vol. 1, p. 147; *Ortolan, Diplomatie de la Mer*, tome 2, ch. 9; *Duer, On Insurance*, vol. 1, p. 658; *Vattel, Droit des Gens*, liv. 3, ch. 7, § 117; *Phillimore, On Int. Law*, vol. 3, § 298.)

§ 17. It has been held by the English courts of admiralty, that the notification of a blockade to a neutral government, is, by construction of law, a direct personal notice to each inhabitant of that country, and that he cannot be allowed to aver his own ignorance of the blockade, or otherwise contradict the legal presumption of knowledge. To allow individuals to plead ignorance of a blockade which had been notified to their government, would wholly defeat the object of the notification. It is true, that the exclusion of this evidence may operate with severity in particular cases; but an opposite construction would render a notification, in the words of Sir William Scott, "the most nugatory thing in the world." If the neutral government should fail to communicate the information to its subjects, by a prompt and authoritative pub-

lication of the notice which it receives, those subjects who suffer from such neglect cannot complain of the belligerent state, but must address their complaints, and demand for compensation, to their own government. (*Kent, Com. on Am. Law*, vol. 6, pp. 147, 148; *Phillimore, On Int. Law*, vol. 3, § 290; *Duer, On Insurance*, vol. 1, p. 659; *The Neptunus*, 2 Rob. Rep., p. 110; *The Vrouw Johanna*, 2 Rob. Rep., p. 109; *The Jonge Petronella*, 2 Rob. Rep., p. 181; *Ortolan, Diplomatie de la Mer*, tome 2, ch. 9; *Wildman, Int. Law*, vol. 2, p. 188; *The Spes and Irene*, 5 Rob. Rep., p. 79; *The Welvaart*, 2 Rob. Rep., p. 128; *Heffter, Droit International*, § 159; *Riquelme, Derecho Pub. Int.*, lib 1, tit 2, cap. 18; *Bello, Derecho Internacional*, pt. 2, cap. 8, § 5; *Hautefeuille, Des Nations Neutres*, tit. 9, ch. 3.)

§ 18. A question may here arise as to what constitutes a public notification. This is usually in the form of an official communication from the belligerent to the authorities of neutral states. It may be a notice that a certain port will be blockaded on and after a certain date, or that it is the intention of the belligerent to proceed to blockade certain ports or harbors. The latter form being indefinite as to time would require a subsequent notice of the commencement or time of the actual blockade. Sometimes several notifications are given, such as a notice of intention, a subsequent notice of the sailing of the naval forces for the purpose of carrying that intention into execution, and finally a notice of the actual commencement of the blockade. The two former are given as a matter of courtesy, for the information of neutrals. The French have held that a general *diplomatique* notice is not sufficient to charge parties with a knowledge of a blockade, but there must be an actual notice by the blockading force. This doctrine was distinctly announced by Count Molé in his letter of October 20th, 1838, to the French minister of marine, in relation to the French blockade of Vera Cruz, Mexico, and is strenuously advocated by Ortolan and other French writers on international law. As already remarked, British writers and British courts of admiralty regard a public or diplomatic notice of a blockade, as, by construction of law, a direct, personal notice, to each inhabitant of the state so notified. (*Hautefeuille, Des Nations Neu-*

*tres*, tit. 9, ch. 5, secs. 1, 2; *Bello, Derecho Internacional*, pt. 2, cap. 8, § 5; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 18; *Duer, On Insurance*, vol. 1, p. 659; *Phillimore, On Int. Law*, vol. 3, § 291; *Ortolan, Diplomatie de la Mer*, tome 2, ch. 9; *The Spes and Irene*, 5 Rob. Rep., p. 79; *The Rolla*, 6 Rob. Rep., p. 368.)

§ 19. Instead of a direct official notification to a neutral government of the establishment of, or intention to institute, a blockade of a particular port, a general notice to that effect is sometimes given by official publication in the newspapers. By this means information is distributed among the mercantile community more generally and expeditiously than through the ordinary channels of official communication with the neutral government. Thus, where the vessel intercepted is destined to a blockaded port, and there is clear and positive proof that the existence of the blockade was generally known at her port of departure when she sailed, neither the master nor his owners, nor the shippers of the goods, will be permitted to aver their personal ignorance of that which it is scarcely possible they should not have known, or, at any rate, by due inquiry might have ascertained. To allow proof of personal ignorance in such a case, by admitting the affidavits of the master or his crew, would be a direct invitation to perjury and fraud. (*Kent, Com. on Am. Law*, vol. 1, p. 148; *Hautefeuille, Des Nations Neutres*, tit. 1, ch. 3, secs. 1, 2; *The Adelaide*, 2 Rob. Rep., p. 111; *The Frederick Molke*, 1 Rob. Rep., p. 86; *The Hare*, 1 Act. Ap. Ca., p. 261.)

§ 20. Where a neutral vessel is intercepted on her passage, with a cargo from a blockaded port, and the cargo is proved to have been shipped after the blockade had commenced, and was known at the port, the party is precluded from denying his knowledge of its existence. The personal ignorance of the master, in such a case, could only have arisen from a fraudulent determination not to know,—an obstinate exclusion of knowledge it was his duty to have acquired; and if his personal ignorance could be proved, it would not form even an equitable defense. He is, therefore, very justly precluded from denying his knowledge of what it is morally impossible he should have been ignorant, except for a fraudulent intent. (*Duer, On Insurance*, vol. 1, p. 660; *The*

*Frederick Molke*, 1 Rob. Rep., p. 86; *The Vrouw Judith*, 1 Rob. Rep., p. 150; *The Adelaide*, 2 Rob. Rep., p. 111; *The Hare*, 1 Act. Ap. Ca., p. 261; *Phillimore, On Int. Law*, vol. 3, § 300; *Wildman, Int. Law*, vol. 2, pp. 186, 189; *Heffter, Droit International*, § 156; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 18; *Bello, Derecho Internacional*, pt. 2, cap. 8, § 5; *Haute-feuille, Des Nations Neutres*, tit. 9, ch. 4, sec. 1.)

§ 21. There are many cases where the inference of a knowledge of the blockade is so probable as to create a strong presumption, but a presumption not entirely conclusive, and which may be repelled by unimpeached and positive proof. Thus a public notification to one neutral state, will be presumed, in due time, to reach the inhabitants of a neighboring power not officially notified of the blockade, as such information, generally circulated in one country, must of necessity in time reach the knowledge of the inhabitants of an adjoining country. But as such notification does not, *proprio vigore*, bind the inhabitants of any state but that to which it is addressed, the presumption of such knowledge, in a reasonable time, may be repelled by positive evidence. So, where a blockade has lasted for such a considerable time as to render it highly probable that its existence must have been known at the port of departure, a knowledge of it will be presumed, and it will rest upon the party to show by satisfactory proof, that he was not apprized of the blockade. Again, where the neutral vessel is intercepted on her egress from a blockaded port, with a cargo shipped immediately after the blockade had commenced, and while it might have been unknown to the inhabitants of the port when the vessel sailed, the party will be allowed to rebut the presumption of law by satisfactory proof, of his ignorance of the establishment of the blockade. In all cases of this kind, where the presumption of knowledge is not absolute and conclusive, the neutral claimant is allowed to prove his own innocence. And the captor can judge from the nature and circumstances of each particular case, whether the neutral vessel is acting in good faith, and is really ignorant of the existence of the blockade, or whether the pretended ignorance is a mere fraudulent attempt to deceive. (*Wildman, Int. Law*, vol. 2, pp. 188, 189; *Duer, On Insurance*, vol. 1, p. 662; *The Adelaide*,

2 Rob. Rep., pp. 110, 112; *The Calypso*, 2 Rob. Rep., p. 298; *The Hurtige Hane*, 3 Rob. Rep., p. 328; *Phillimore, On Int. Law*, vol. 3, § 801; *Manning, Law of Nations*, pp. 323, et seq.; *Pistoye et Duvcrdy, Traité des Prises*, tit. 6, ch. 2, sec. 2; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 18; *Bello, Derecho Internacional*, pt. 2, cap. 8, § 5.)

§ 22. Where there are no legal or probable grounds for imputing to the master of a neutral vessel the knowledge of the existence of a blockade which he is charged to have violated, it rests upon the captor to establish the fact of this knowledge by positive evidence. To warrant a condemnation, the proof must be clear and definite that such vessel had been duly notified of the blockade, and had undertaken or prosecuted the voyage in defiance of the notice or warning. To be binding, the notice or warning must be clear, and not so ambiguous or insidious as to be calculated to mislead the neutral master, otherwise it is illegal and void. Where it is expressed in such general terms as to embrace other ports not blockaded, it is not even valid as to the blockaded port, although included in the general language. Where the notice is irregular and insufficient, no penalty is incurred by its contravention. Proof of the actual knowledge of the party at the inception of the voyage, supersedes, in all cases, the necessity of a warning, nor is it of any importance by what means or in what form he received the information, if the information was credible in its nature, and came in such a form and from such a source as to leave no reasonable ground on his mind as to its authenticity; he is not permitted to aver that he placed no confidence in a communication that had just claims to his belief. Again, if the voyage was commenced without a knowledge of the blockade, but he was afterward notified of its existence by a cruiser, or officer of the blockading state, and he continue his voyage with the evident intention of entering the blockaded port, he is liable to condemnation. (*Kent, Com. on Am. Law*, vol. 1, pp. 147, 148; *Duer, On Insurance*, vol. 1, p. 663; *The Mercurius*, 1 Rob. Rep., p. 80; *The Henrick and Maria*, 1 Rob. Rep., p. 146; *The Vrouw Judith*, 1 Rob. Rep., p. 150; *The Apollo*, 5 Rob. Rep., p. 286; *The Columbia*, 1 Rob. Rep., p. 156; *Phillimore, On Int. Law*, vol. 3, § 302; *Heffter, Droit International*, § 155.)

§ 28. An actual entrance into a blockaded port is, by no means, necessary to render a neutral ship guilty of a violation of the blockade. Indeed, such a construction would essentially defeat the very object of a blockade, by rendering the capture of a ship lawful, only after such capture had ceased to be possible. Hence it is universally held that an *attempt* to enter the port, knowing it to be blockaded, completes the offense to which the penalty of the law is attached. It is the attempt to commit the offense, which, in the judgment of the law, constitutes the crime, and is as much a breach of neutrality as an actual entrance into the prohibited port. It would be absurd to say that the penalty is not incurred till the unlawful design is fully accomplished, for the offender would, in most cases, be placed, by its accomplishment, beyond the reach of the law. Nor is the word "attempt" to be understood in a literal and narrow sense. It is not limited to the conduct of the ship at the mouth of the blockaded port, but is applicable to her whole conduct from the moment she has knowledge of the existence of the blockade, and the consequent prohibition of neutral commerce. If she has this knowledge before she begins her voyage, the offense is complete the moment she quits her port of departure, if that knowledge is communicated to her during the voyage, its continued prosecution involves the crime, and justifies the penalty; if it is not given to her till she reaches the blockading squadron, she must immediately retire, or she is made liable to confiscation. It is not the mere mental intention that the law punishes, but it is the overt act by which the execution of an unlawful intent is begun. This overt act is the starting for, or proceeding toward, the prohibited port, with the knowledge that it is blockaded. The same rule prevails in all analagous cases of unlawful voyages. (*Wheaton, Elem. Int. Law*, pt. 4, ch. 3, § 28; *Kent, Com. on Am. Law*, vol. 1, p. 148; *Duer, On Insurance*, vol. 1, pp. 330, 331, 586, 666, 688; *The Vrouw Johanna*, 2 Rob. Rep., p. 109; *The Neptune*, 2 Rob. Rep., p. 110; *The Spes and The Irene*, 5 Rob. Rep. p. 76; *The Shepherdess*, 5 Rob. Rep., p. 262; *The James Cook*, Edw. Ad. Rep., p. 261; *The Betsy*, 1 Rob. Rep., p. 382; *The Columbia*, 1 Rob. Rep., p. 154; *The Nereide*, 9 Oranah. Rep., p. 440; *Vos and Graves v. N. Ins. Co.*, 1

*Caines Cases*, p. 7; 2 *Johns Cases*, pp. 180, 469; *Yeaton v. Fry*, 5 Cranch. Rep., p. 335; *Fitzsimmons v. N. Ins. Co.*, 4 Cranch. Rep., p. 185; *Heffter, Droit International*, §§ 155, 156; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 18; *Bello, Derecho Internacional*, pt. 2, cap. 8, § 5.)

§ 24. Several continental writers of authority contend that the inception of a voyage for a blockaded port, with a knowledge of the existence of the blockade, is not such an offense as to render the vessel subject to seizure upon the high seas. Indeed, they regard such seizure as a violation of the liberty of the seas and of the independence of the sovereign state to which the vessel belongs. But English and American publicists have generally held, and the decisions of British and American courts of admiralty seem to sustain the opinion, that the inception of the voyage, with a knowledge of the blockade, and the *intention* to enter, is sufficient in law to constitute the offense and incur penalty, and that the *intention* will be presumed from the fact of commencing the voyage with the knowledge of the existence of the blockade. They say that the vessel had no right to commence the voyage with such knowledge, and that the act of inception is, in itself, as a general rule, illegal and punishable as a breach of neutrality, and, therefore, that the master or owners are not permitted to aver that they merely intended to proceed to the blockaded port to ascertain, by due inquiry, whether the blockade still continued, and to enter it only in case the blockade had ceased. (*Heffter, Droit International*, § 156; *Hautefeuille, Des Nations Neutres*, tit. 9; *Ortolan, De Diplomatie*, tome 2, p. 32; *Bello, Derecho Internacional*, pt. 2, cap. 8, § 5; *Jacobson, Seerecht, etc.*, p. 682; *Pando, Derecho Internacional*, pp. 500–503; *Pistoye et Duverdy, Traité des Prises*, tit. 6, ch. 2, sec. 2; *Duer, On Insurance*, vol. 1, pp. 691–698, note 1; *Wildman, Int. Law*, vol. 2, pp. 194, 197; *Phillimore, On Int. Law*, vol. 3, § 298; *Olivera v. Union Insurance Co.*, 3 Wheaton Rep., p. 196, note; *Vide, also, cases referred to ante*, § 23.)

§ 25. But this general rule is subject to some important exceptions, or rather the inference, from the inception of the voyage with knowledge of the blockade, of *intention* to violate it, may, in some cases, be removed by proof to the contrary. Thus, where the vessel sails from a distant country,

she may clear with a provisional destination to the blockaded port, without incurring the penalty of a breach of the blockade, provided it be clearly and positively proved that she intended to proceed to the blockaded port only in case she ascertained, by due inquiry, during the voyage, that the blockade had been raised. This may be shown by instructions to the master not to pursue the voyage unless, by inquiry at a port of the blockading power, or of some neutral state, be found that the blockade had ceased. These instructions to the master must clearly set forth the necessity of the previous inquiry, and the mode in which it is to be made, in order to furnish satisfactory proof of the intentions of the parties. The presumption is against them, and to repel the presumption the equivocal evidence of ambiguous instructions will not be sufficient. But no matter how distant the country from which the vessel sails, she has no right to proceed to the entrance of the blockaded port with a view to ascertain from the blockading force whether she can be permitted to enter. An inquiry from the blockading force is only justifiable when the master, who finds himself in its presence, was ignorant that the blockade existed. In other cases, a vessel found in a situation to make the inquiry, if destined to the blockaded port, is liable, from her previous knowledge, to instant capture. A neutral merchant, says Sir William Scott, has no right to speculate on the greater or less probability of the termination of a blockade, and, on such speculation, to send his vessel to the very mouth of the blockaded river, or port, with instructions to the master to enter, if no blockading force appeared, otherwise to demand a warning, and proceed to a different port. A rule that would permit this, would be introductory of the greatest frauds. (*Phillimore, On Int. Law*, vol. 3, § 303; *Duer, On Insurance*, vol. 1, pp. 668, 669; *The Spes and Irene*, 5 Rob. Rep., pp. 80, 81; *The Betsey*, 1 Rob. Rep., p. 332; *The Posten*, 1 Rob. Rep., p. 386, note; *The Shepherdess*, 5 Rob. Rep., p. 262; *The Little William*, 1 Act. Ad. Rep., p. 141; *Bello, Derecho Internacional*, pt. 2, cap. 8, § 5.)

§ 26. "It seems a just inference from the decisions," says Mr. Duer, "that where the blockade has been constituted simply by the fact of an investment, although its existence



was known at the port of departure, previous to the sailing of the neutral ship, she may clear out, provisionally, for the blockaded port; but that, in this, as in former cases, the inquiry upon the result of which the right to complete the voyage must depend, must be made at a port of the blockading state, or of a neutral power. I see no reason to doubt that the prohibition to proceed to the mouth of the blockaded port embraces all cases of a previous knowledge, from whatever source the knowledge may have been derived; and that, in all, its violations is subject to the same penalty." (*Duer, On Insurance*, vol. 1, pp. 669, 670; *The Neptunus*, 2 Rob. Rep., p. 114; *The Spes and Irene*, 5 Rob. Rep., pp. 80, 81; *The Betsey*, 1 Rob. Rep., p. 332; *The Posten*, 1 Rob. Rep., p. 336; *The Shepherdess*, 5 Rob. Rep., p. 262; *The Little William*, 1 Act. Rep., p. 141.)

§ 27. There are other cases where the criminal intent to violate a blockade is deduced from the facts existing at the time of capture, and forming a presumption which the party is not permitted to repel by his own denial. Thus, vessels, though not ostensibly destined to the blockaded port, cannot innocently place themselves in a situation that would enable them to violate the blockade at their pleasure. Even when they are bound, by their papers, to different ports, their suspicious approximation to that under blockade will subject them to condemnation. Were they permitted, on the pretense of an intention to proceed to another port, to approach so close to that blockaded as to be able to slip in without obstruction, whenever they choose, it would be impossible that any blockade could be long maintained. Hence, it is not unfair to hold, that the intention of the party, in such cases, to violate the blockade, is a necessary and absolute presumption; although the excuse of necessity, when established, is doubtless to be admitted. The proof, however, must be clear and satisfactory, to remove the inference of guilt. (*Wildman, Int. Law*, vol. 2, p. 206; *Phillimore, On Int. Law*, vol. 3, § 362; *Duer, On Insurance*, vol. 1, p. 670; *The Neptune*, 2 Rob. Rep., p. 114; *The Neutralitet*, 6 Rob., p. 80; *The Little William*, 1 Act. Rep., p. 141; *The Gute Erwartung*, 6 Rob. Rep., p. 182; *The Arthur*, 1 Edw. Rep., p. 292; *The Charlotte Christine*, 6 Rob. Rep., p. 103; *Bello, Derecho Internacional*, pt. 2, cap. 8, § 5.)

§ 28. For a neutral ship to *enter* a blockaded port, is altogether unlawful. If she entered with a cargo, the legal presumption is, that she went in with the fraudulent intention of delivering it, and if she come out again without delivering it, that fact will not remove the presumption, because some change of circumstance may have altered that intention. If she entered in ballast, it is to be presumed that she went in for the purpose of bringing away property, and, for the same reason as above, her egress, still in ballast, will not oust that presumption. On this point, we quote the remarks of Duer: "A neutral ship," he says, "is not permitted to enter a blockaded port, even in ballast, for, although an exception of this kind is allowed in the case of an egress, the reasons on which it is founded are not applicable to an inward voyage. The egress is necessary to restore the ship to the beneficial use of the owners, and can tend, in no degree, to aid the commerce that is meant to be prohibited; but there can be no necessity for sending a ship to a blockaded port, and the intention of procuring a freight is the only assignable motive of the voyage. It is a fair presumption, that it is intended that she shall return with a cargo, purchased or prepared in the blockaded port, not that she shall return in ballast, thus rendering the entire expedition a fruitless expense; nor that she will remain useless in port during the uncertain period that the blockade may continue. Nor is it admitted, in such cases, as an adequate excuse, that the object of the voyage was to bring away property that was absolutely locked up by the blockade, and which there was no other mode of extricating. It can rarely happen that other channels of communication are not open, and, in all cases, the property may be sold, and its value remitted in money or in bills. The only adequate excuse, is that of physical necessity." (*Duer, On Insurance*, vol. 1, pp. 671, 672; *The Comet*, 1 Edw. Rep., 32; *The Charlotte Christine*, 6 Rob. Rep., p. 103; *Phillimore, On Int. Law*, vol. 8, § 302; *Wildman, Int. Law*, vol. 2, p. 195; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 18; *Bello, Derecho Internacional*, pt. 2, cap. 8, § 5; *The Charlotta*, 1 Edw. Rep., p. 252.)

§ 29. We have already stated that any *attempt* to enter a blockaded port, after due information or warning, subjects

the party to the penalty of the law ; “ but, whether the mere *declarations* of the master, when detained and warned by a ship of the blockading force, of his *intention* to persist in the voyage, notwithstanding the warning, is to be considered as evidence of an actual attempt, justifying an immediate capture, is exceedingly doubtful.” The mere hasty expressions of the master, resulting from resentment and surprise, certainly ought not to produce the condemnation of property entrusted to his care. But where the declaration of the master is proved to be deliberate and is accompanied by such facts as induce the court to believe that he *really* intended to carry it into effect, Sir William Scott was of opinion that it supersedes the necessity of proving further facts, and it is of itself a sufficient ground of condemnation. Chief Justice Marshall, in enumerating several general acts that would be justly regarded as evidence of such an attempt, adds : “ possibly the obstinate determined declarations of the master, of his resolution to break the blockade, might bear the same interpretation.” The supreme court of Pennsylvania have clearly decided that the declarations of the master, however positive and unequivocal, are evidence merely of intention, which, unless followed by some voluntary act after his release, can never constitute the offense to which alone the penalty attaches. (*Duer, On Insurance*, vol. 1, pp. 672, 673, 675 ; *The Apollo*, 5 Rob. Rep., p. 289 ; *Fitzsimmons v. Newport Ins. Co.*, 4 Cranch. Rep., p. 185 ; *Calhoun v. Ins. Co. of Penn.*, 1 Binny, Rep. p. 293 ; *The Neutralitet*, 6 Rob. Rep., p. 35 ; *Bello, Derecho International*, pt. 2, cap. 8, § 5.)

§ 30. Although the declarations of the master, during his detention, will not constitute in itself sufficient cause for condemnation, his subsequent conduct, either with or without such declarations, may determine the lawfulness of his capture. It is his duty, on being duly warned, to alter the course of his voyage, as soon as he is at liberty to resume it, and to depart at once from the vicinity of the blockaded port. “ He has no right to linger in its neighborhood, on the pretense of a deliberation as to the course he shall pursue, thus compelling the belligerent ship, either to leave him to enter the blockaded port without obstruction, or to wait for an indefinite time to watch his motions. He is bound to

manifest, by his immediate acts, his determination to obey the warning he had received. Hence a very short delay, an interval probably of less than an hour, will enable the belligerent to determine whether the master is pursuing the course he is bound to observe, or whether the temporary detention may not lawfully be followed by a final capture. It is scarcely possible that a neutral ship, thus circumstanced, shall escape, otherwise than by an abandonment in good faith of the voyage, that the warning she had received has rendered illegal." (*Duer, On Insurance*, vol. 1, pp. 675, 676; *The Apollo*, 5 Rob. Rep., p. 289; *Fitzsimmons v. Newport Ins. Co.*, 4 Cranch Rep., p. 185; *Ortolan, Diplomatie de la Mer*, tome 2, ch. 1.)

§ 31. If the master persist in his voyage to a blockaded port, in defiance of a sufficient and legal warning, no excuse is ever admitted for his conduct, and the ship and cargo are invariably condemned. "His misconduct may, in no degree be imputable to his owners, yet their innocence affords no protection to their property. His acts may be in direct violation of their express instructions, may even amount to fraud or barratry; yet his owners will continue to be bound by their legal consequences, to the same extent, as if they had been performed under their previous sanction and authority. Indeed the rule, so far as relates to the ship, and the property of its owners, is universal, that they are concluded by the acts of the master. He is their agent, and the property they have entrusted to his care is, in all cases, responsible for his just observance of the duties of neutrality." (*Duer, On Insurance*, vol. 1, p. 676; *Wildman, Int. Law*, vol. 2, p. 194; *The Shepherdess*, 5 Rob. Rep., p. 262; *The Vrouw Judith*, 1 Rob. Rep., p. 150; *The Mercurius*, 1 Rob. Rep., p. 80.)

§ 32. There are but few cases where the entrance of a vessel into a blockaded port, or an attempt to enter, is ever justified or excused. A license from the government of the blockading state to enter the blockaded port is always a sufficient justification, and, as will be shown hereafter, all such licenses are to be liberally construed. But a general license to enter the port before the blockade would not be available after it had commenced; to constitute a sufficient protection it must authorize the vessel to enter the port as one blockaded. Again, a physical necessity, arising from the imme-

diate need of water, or provisions, or repairs, produced by stress of weather, which leave no other alternative for safety. "But as, in order to cover a real design to dispose of a cargo," says Mr. Duer, "the pretext of a necessity is easily framed, the excuse is necessarily liable to great suspicion, and, in all cases, as justly subject to a rigid scrutiny. Hence, it is established that the evidence relied on must clearly show an imperative and overruling compulsion to enter the particular port under blockade. It is not enough that it appears that there were existing and adequate causes to justify the ship in deviating from her voyage, to an intermediate port of necessity. It must also appear that she could not have proceeded, without hazard, to any other port than that blockaded, and that in no other port to which she could have proceeded, could her necessary wants have been supplied. In short, the necessity that alone can save her, when captured, from condemnation, must be evident, immediate, pressing, and, from its nature, not capable of removal by any other means than by the course she had adopted." (*Wildman, Int. Law*, vol. 2, pp. 196, 202, 203; *Duer, On Insurance*, vol. 1, pp. 678, 679; *The Hurtige Hane*, 2 Rob. Rep., p. 124; *The Fortuna*, 5 Rob. Rep., p. 27; *The Elisabeth*, 1 Edw. Ad. De, p. 198; *The Arthur*, 1 Edw. Ad. De, p. 202; *The Charlotte*, 1 Edw. Ad. De, p. 252; *The Hoffnung*, 2 Rob. Rep., p. 163; *Bello, Derecho Internacional*, pt. 2, cap. 8, § 5; *The Neutralitet*, 6 Rob. Rep., p. 32.)

§ 33. As a general rule the egress of a ship, during blockade, is regarded as a violation of the blockade, and renders her liable, in the first instance, to seizure, and to exempt her from condemnation the most satisfactory proof is required to be given. There are, however, many cases where the egress is innocent, although the knowledge of the blockade, by the master, is admitted or proved. But the taking on board a cargo, with a knowledge of the blockade, is considered a fraudulent act, and the sailing of the ship, with such a cargo, a violation of the blockade. "Nor is it necessary that the whole of the cargo should be thus laden; where even a portion of the goods are taken on board after the existence of the blockade is known, the act is considered as a fraud that justifies a general condemnation. The ground of these legis-

sions are, that after the commencement of a blockade, the interposition of a neutral to assist in any way the exportation of the property of the enemy, tends directly to relieve him from the distress that the blockade was meant to create. It would defeat a principal object of the hostile proceeding; consequently, after the commencement of the blockade, a neutral is no longer at liberty to make any purchase in the place, with a view to exportation." (*Phillimore, On Int. Law*, vol. 3, § 313; *Duer, on Insurance*, vol. 1, pp. 681, 682; *The Vrow Judith*, 1 Rob. Rep., p. 150; *The Neptunus*, 1 Rob. Rep., p. 170; *The Byfield*, 1 Edw. Ad. Rep., p. 188; *The Juno*, 2 Rob. Rep., p. 119; *The Calypso*, 2 Rob. Rep., p. 298; *The Betsey*, 1 Rob. Rep., p. 98; *The Rolla*, 6 Rob. Rep., p. 371; *Ortolan, Diplomatie de la Mer*, tome 2, ch. 9; *Wildman, Int. Law*, vol. 2, p. 202; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 18; *Bello, Derecho Internacional*, pt. 2, cap. 8; § 5; *Hautefeuille, Des Nations Neutres*, tit. 9, ch. 4, sec. 2.)

§ 84. There are a number of cases in which the egress of the neutral vessel, during a blockade, is justified or excused: *First*, If the ship is proved to have been in the blockaded port when the blockade was laid, she may retire in ballast, for such egress affords no aid to the commerce of the enemy, and has no tendency to defeat any legitimate purpose for which the blockade was established. *Second*, If the ingress was from physical necessity, arising from stress of weather, and the immediate need of water, or provisions, or repairs. *Third*, Where the entrance with a cargo was authorized by a license, such license is construed to authorize the return of the ship with a cargo. *Fourth*, Where a neutral ship, arriving at the entrance of a blockaded port, in ignorance of the blockade, is suffered to pass, there is an implied permission to enter, which fully protects her egress. But this implied permission does not, of necessary consequence, protect the cargo, for its owners may be guilty of a criminal violation of the blockade even where the ship is innocent. *Fifth*, A neutral ship, whose entry into the blockaded port was lawful, is permitted to return with her original cargo that has been found unsaleable, and reshipped during the blockade. *Sixth*, "Another, and a very equitable exception," says Duer, "is allowed in favor of a neutral ship that leaves the port in

the just expectation of a war between her own country and that to which the blockaded port belongs, In this case, she is permitted to depart, even with a cargo purchased from the enemy during the blockade, if the purchase was made with the funds of neutral owners, and the investment and shipment were probably necessary to save the property, in the event of a war, from a seizure and confiscation by the enemy. But it is not the mere apprehension of a remote and possible danger that will entitle a neutral ship to this exemption. To save the vessel and cargo from condemnation, it must appear that there was a well-founded expectation of an immediate war, and, consequently, that the danger of the seizure and confiscation of the property was imminent and pressing." (*Phillimore, On Int. Law*, vol. 3, § 313; *Duer, On Insurance*, vol. 1, pp. 682, 683; *The Maria Schroeder*, 4 Rob. Rep., p. 89, note; *The Drie Vrienden*, 1 Dod. Ad. Rep., p. 269; *The Was-sen Hundt*, 1 Dod. Ad. Rep., p. 270, note; *The Potsdam*, 4 Rob. Rep. p. 89; *Wildman, Int. Law*, vol. 2, p. 202; *Heffter, Droit International*, §§ 155, 156; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 18.

§ 35. "No rule in the law of nations," says Duer, "is more certainly and absolutely established, than that the breach of a blockade subjects all the property, so employed, to confiscation by the belligerent power whose rights are violated. Among all the contradictory positions that have been advanced on the law of nations, this principle has never been disputed. It is to be found in all the writings on public law; is frequently admitted, and never denied, in treaties; is universally acknowledged by all governments that have any degree of civil instruction; and is known to all their subjects, who have any interest to possess the knowledge. \* \* \* The confiscation of the ship, where a violation of the blockade is justly imputed to the owners, or to the master, acting with or without the authority of the owners, is, in all cases, a necessary consequence. \* \* \* The goods that compose the cargo, so far as they are the property of the owners of the ship, upon the principle stated, necessarily share its fate; and even where they are the property of other shippers, as a general rule, they are involved in the same condemnation. It is only in a few cases, where the

innocence of the owner is apparent and undeniable, that they are exempt. The *presumption* of law, founded on very probable reasoning, is, that the violation of a blockade is intended for the benefit of the cargo, as well as of the ship, and, consequently, that it is made with the sanction and under the instructions of its owners; and, in all cases, where the innocence of the owners is not manifested by the papers on board, this presumption prevails to exclude the proof. Thus, the rule applies, even where the apparent destination of the ship, judging from her papers, was to a different port, and the attempt to enter that under blockade was a deviation from the regular course of the voyage. Where the only assignable motive for such a deviation is an intention to dispose of the cargo in the blockaded port, and, by such a disposition, to promote the interests of its owners, they are not allowed to contradict the presumption that the master, thus visibly acting for their benefit, was not also acting under their secret authority." (*Phillimore, On Int. Law*, vol. 3, §§ 316, et seq.; *Ortolan, Diplomatie de la Mer*, tome 2, ch. 9; *Duer, On Insurance*, vol. 1, pp. 683–685; *Kent, Com. on Am. Law*, vol. 1, p. 143; *Vattel, Droit des Gens*, liv. 3, ch. 7, § 117; *The Columbia*, 1 Rob. Rep., p. 154; *The Vrow Judith*, 1 Rob. Rep., p. 150; *The Mars*, 6 Rob. Rep., p. 87; *The Alexander*, 4 Rob. Rep., p. 93; *The Adonis*, 5 Rob. Rep., p. 256; *Wildman, Int. Law*, vol. 2, pp. 203–206; *Heffter, Droit International*, §§ 154–156; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 18; *Bello, Derecho Internacional*, pt. 2, cap. 8, § 5; *Hautefeuille, Des Nations Neutres*, tit. 1, ch. 4, sec. 2.)

§ 36. But if it be clearly established, by proofs found on board at the time of the capture, that, at the inception of the voyage, the owners of the cargo stood clear, even from a possible intention of fraud, their property will be excepted from the penal consequences of the breach of the blockade. Thus, where the illegality consists in the misconduct of the master in attempting to enter a blockaded port, if it be certain that, when the voyage commenced, the existence of the blockade neither was, nor could have been, known at her port of departure, the owners of the cargo could not possibly have contemplated a breach of the blockade. In such cases, the act of the master, although it prevail to condemn the ship, will



not condemn the cargo also, for there is no general or necessary relation of principal and agent between its owners and the master. So, also, in case of egress, the ship may be subject to condemnation, and yet the cargo may be restored, although laden during the blockade, if the innocence of its owners be certain and indisputable. Thus, if their orders for the shipment of the goods were given to their agents in the blockaded port before the blockade existed, or was known to exist, and they could not, by any diligence, after the blockade was known to them, countermand their orders in time to prevent their execution, the owners are deemed innocent. In such cases, the agents and owners do not stand in the same relative situation of ordinary agents and principals, for the interests of the former are not only distinct from, but actually opposed to, those of the latter. It must be remarked, however, that, in all cases, whether of ingress or egress, in which an exception is allowed in favor of the cargo, the evidence of the innocence of its owners must be so clear and certain as to exclude any possible imposition on the mind of the court. Another exception, in this relation, deserves notice. A neutral, domiciled in an enemy's country, *in itinere*, on his return home to reside, was a passenger, with his family, in a neutral vessel, which was guilty of a breach of blockade. The specie which he had with him, for the support and comfort of himself and family, was taken as prize. But the supreme court decreed restitution, on the ground that he had a right to carry with him such property, which was not a mercantile adventure, and that, being personally in no fault, such property was not forfeited by a breach of blockade by the vessel in which he had taken passage. (*Phillimore, On Int. Law*, vol. 3, §§ 318, 319; *Duer, on Insurance*, vol. 1, pp. 686, 688; *Kent, Com. on Am. Law*, vol. 1, p. 151; *The Exchange*, 1 Edw. Ad. Rep., p. 43; *The Alexander*, 4 Rob. Rep., p. 93; *The Mercurius*, 1 Rob. Rep., p. 80; *The Neptunus*, 3 Rob. Rep., p. 173; *The Adelaide*, 3 Rob. Rep., p. 281; *The Manchester*, 2 Act. Ad. Rep., p. 687; *The United States v. Guillem*, 11 Howard Rep., p. 62; *Wildman, Int. Law*, vol. 2, pp. 233-296; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 18; *Bello, Derecho Internacional*, pt. 2, cap. 8, § 5.)

§ 87. "To justify a capture for the violation of a blockade," says Duer, "or the attempt to violate it, the offense must continue to exist at the time of seizure. In technical language, the ship must be then in *delicto*. In cases where the ship has violated the blockade by egress, the *delictum* continues during her whole voyage, till she has reached her final port of destination. Until then, as the offense consists, not in the mere attempt, but in an actual breach, no change of circumstances, or subsequent repentance, can efface the guilt. It is not cancelled by a mere interruption of the voyage, such as the stopping of the ship at an intermediate port, either from necessity or design; when she resumes her voyage, she becomes again subject to the penalty of the law. But when a ship sails for a blockaded port, with a knowledge of the blockade, and the intention to violate it, the offense is so far complete as to justify her immediate capture; yet, as it exists only in an attempt, the *delictum* does not necessarily continue during the whole of her subsequent voyage. If, previous to her capture, the blockade had ceased to exist, or the master, from the information of a ship of war of the blockading state, had just grounds for believing that such was the fact, or had altered his destination, with the intention of not proceeding at all to the blockaded port, the offense no longer exists, and that which had existed is no longer punishable. To constitute the offense, three circumstances must be found to coëxist. The fact of a blockade, the party's knowledge of its existence, and his intention to violate it, and in each of the above cases, an indispensable circumstance is wanting. The *delictum*, therefore, at the time of capture, had wholly ceased, and both ship and cargo will be restored." (Duer, *On Insurance*, vol. 1, pp 688, 689; Wildman, *Int. Law*, vol. 2, p. 208; *The Welvaart*, 2 Rob. Rep., p. 128; *The Juffrow Maria*, Schreder, 3 Rob. Rep., p. 147; *The Gen. Hamilton*, 6 Rob. Rep., p. 61; *The Lisette*, 6 Rob. Rep., p. 387; *The Neptunus*, 2 Rob. Rep., p. 114; *The James Cook*, Edw. Ad. Rep., p. 268; *Manning*, *Law of Nations*, pp. 328, 329.)

§ 88. It may be stated, in general terms, that an insurance, made in the country of the blockading state, is necessarily invalid from the time the property insured becomes liable to confiscation by the violation, or attempted violation, of a

blockade, and that the invalidity continues so long as this liability exists. "Where the ship is insured upon time," says Duer, "although the contract may not be void in its origin, it may be rendered so, by the contravention of a blockade, for the particular voyage to which the legal penalty attaches; but where the voyage has been terminated, and the liability to capture no longer exists, it seems probable that the obligation of the contract would be held to revive. The effect of a supervening war, by which the property insured is rendered that of an enemy, according to Lord Ellenborough, is to exonerate the insurers from all the risks of the policy during the continuance of the hostilities. This language plainly implies that the contract is not annulled, but merely suspended by the operation of the war, and that the return of peace, should the policy not have expired by its own terms, will restore its life and obligatory force. The doctrine seems, in itself, just and reasonable, and, in cases where the policy is not so entire as to preclude any separation of its risks, may be applied, with equal justice, to every case of supervening illegality; that is, an illegality arising after the commencement of the risks." Such seems to be the rule established by the most recent decisions of the courts of common law in England, although the opposite rule has been assumed in the United States. (*Duer, On Insurance*, vol. 1, pp. 689, 690, and note 2, pp. 463-478; *Brandon v. Curling*, 4 East. Rep., p. 410; *Harratt v. Wise*, 9 Barn. and Cres., p. 712; *Naylor v. Taylor*, 9 Barn. and Cres., p. 718; *Medeiros v. Hill*, 8 Bing. Rep., p. 231.)

§ 39. It is deemed proper, before concluding this chapter, to allude to Hautefeuille's theory of blockades, as his views differ from those of the generality of writers on international law, and especially from the decisions of English and American jurists. M. Hautefeuille considers the right of maritime blockade to result from the right of conquest, by the successful belligerent's getting military possession of an enemy's port, or of a belt of territorial sea surrounding or commanding it, precisely as he would of a belt of land around a fort in case of a siege. The conqueror, being thus in possession of a portion of an enemy's territory, may, so long as he retains that possession, extend over it his own laws and jurisdiction. He

may prohibit foreigners from entering such territory, either for commerce or any other purpose, or he may permit them to enter on such terms as he may see fit to impose, precisely as he might do if it were a part of his most ancient dominion. The right of blockade, therefore, extends over only so much of the sea as is, in international law, regarded as territorial and liable to conquest, although the blockading force may be stationed outside of the territorial limit, and consequently on the high sea, which can never be subjected to local jurisdiction. In order to blockade a maritime port, or territorial sea, it is necessary that the blockading force acquire the sovereignty of it, and actually hold it in possession. This definition of a blockade gives rise to very few questions with respect to its establishment or continuance, nor can there be much dispute about what is to be regarded as a violation of it. It is a visible, material fact, and any notification of that fact would be unnecessary and superfluous, for neutrals can see the conqueror's possession, and readily ascertain from him whether or not they are permitted to enter, and if so, upon what terms. So long as they remain without the line of territorial jurisdiction they violate no rights of blockade. If they pass, or attempt to pass, against the will of the new sovereign, this magic line, they become liable to capture; but they must be seized while within the territorial limits, for they cannot be pursued upon the high seas, as no rights of blockade can extend beyond the sovereignty which was acquired by conquest and is continued by actual possession. We think Hautefeuille has confounded the rights of blockade with the rights of military occupation, which are not only distinct in their nature, but essentially different in their legal consequences. Nevertheless, his views are worthy of attention, and he has maintained them with marked ability. It is not so much our object in this work to discuss theories, or to determine what the law of blockades *ought to be*, as to ascertain what that law *now is*, according to the decisions of prize courts, and the opinions of the best writers on international jurisprudence. The rules of maritime war, as now practiced, undoubtedly present some anomalies which cannot be easily reconciled with any abstract theory. (*Hautefeuille, Des Nations Neutres*, tit. 9; *Hautefeuille,*

*Hist. du Droit Mar. Int.*, pt. 3, ch. 1, sec. 1; *Hübner, Saisie des Bateaux Neutres*, pt. 1, ch. 7; *Cocceius, De Jure Belli in Amicos*, § 728; *Ortolan, Diplomatie de la M-r.* liv. 3, ch. 9; *Lampredi, Commerce des Neutres*, pt. 1, § 5; *Galiani, De Dacris, etc.*, cap. 9; *Massé, Droit Commercial*, liv. 2, ch. 2; *Lucchesi-Palli, Droit Maritime*, p. 180.)

## CHAPTER XXIV.

### CONTRABAND OF WAR.

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§ 1. General law of contraband — § 2. All contraband articles to be confiscated — § 3. Ancient rule that cargo affects the ship — § 4. Modern rule — § 5. Cases where ship also is condemned — § 6. Ordinary penalty not averted by ignorance or force — § 7. Inception of voyage completes offense — § 8. Return voyage — § 9. If not contraband at time of seizure — § 10. Transfer of such goods from one port to another — § 11. Destination need not be immediate to enemy's port — § 12. Case of the *Commercen* — § 13. Differences of opinion among text-writers — § 14. Views of Grotius and others — § 15. Of modern publicists — § 16. Ancient treaties and ordinances — § 17. Modern treaties and ordinances — § 18. Conflicting decisions of prize courts — § 19. There is no fixed universal rule — § 20. Implements and munitions of war — § 21. Manufactured articles — § 22. Unwrought articles — § 23. Intended use deduced from destination — § 24. Provisions — § 25. Preëmption — § 26. British rule of preëmption — § 27. Contested by other nations — § 28. Insurance on articles contraband of war.

§ 1. Having already discussed the general rights and duties of neutrals, and the liability of neutral property to capture and condemnation for violation of the law of sieges and blockades, we will now consider the rules of international law with respect to goods contraband of war. The term *contraband* (*contrabandum*, or *contra bannum*) has been used from time immemorial to express a prohibition of certain kinds of commerce. Such prohibitions are found in the

laws of Justinian, in the decrees of the popes and councils in the time of the crusades, and more especially in those issued by different powers during the wars of the Hanseatic league. The theory of the present law of contraband, however, had its origin in the school of Bologna, but its complete development was coincident with the development of the modern laws of commerce. By this term we now understand a class of articles of commerce which neutrals are prohibited from furnishing to either one of the belligerents, for the reason that, by so doing, injury is done to the other belligerent. To carry on this class of commerce is deemed a violation of neutral duty, inasmuch as it necessarily interferes with the operations of the war by furnishing assistance to the belligerent to whom such prohibited articles are supplied. (*Heffter, Droit International*, §§ 158, 159; *Wheaton Elem. Int. Law*, pt. 4, ch. 3, § 24; *Kent, Com. on Am. Law*, vol. 1, pp. 135-143; *Arnold on Insurance*, vol. 1, ch. 5, § 4; *Duer, on Insurance*, vol. 1, pp. 624-648; *Jouffroy, Droit Maritime*, pp. 102, et seq.; *Jacobsen, Seerecht, etc.*, pp. 667-672; *Ortolan, Diplomatie de la Mar.*, liv. 3, ch. 6; *Pando, Derecho Internacional*, p. 540; *Sartorius, Hanseat. Bund*, tome 2, p. 663; *Nau Volkerseerecht*, §§ 153, et seq.; *Hautefeuille, Des Nations Neutres*, tit. 8, sec. 1; *Pistoye et Duverdy, Traité des Prises*, liv. 1, tit. 6, ch. 2, sec. 3; *Bello, Derecho Internacional*, pt. 2, cap. 8, § 4; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 15; *Kalterborn, Seerecht, etc.*, b. 2, p. 413; *Poehls, Seerecht, etc.*, b. 4, p. 1096; *Dalloz, Repertoire verb. Prises Maritimes*; *De Cussy, Droit Maritime*, liv. 1, tit. 3, § 14; *Lampredi, Commerce Des Neutres*, pt. 1, § 7.)

§ 2. There is no difference of opinion with respect to the general rule which prohibits trade in articles contraband of war, whatever may be the extent of disagreement with respect to what articles may properly be regarded as contraband. The noxious articles themselves, (if decided to be *contraband*,) are invariably condemned, and no defense or plea can save them from confiscation, when their character as contraband, and their destination to a hostile port or country, are admitted or established. But the extent of the penalty, for the carriage of such articles, does not seem to be fixed by any positive or uniform rule; or, at least, the decisions seem to

vary with the special circumstances of each case. Nevertheless, it may be possible to deduce from these apparently conflicting decisions of courts of admiralty, some general principle which may form the basis of the rule of international law, with respect to the carriage of such prohibited articles.

- (*Kent, Com. on Am. Law*, vol. 1, pp. 135–143; *Wheaton, Elem. Int. Law*, pt. 4, ch. 3, § 24; *Duer, On Insurance*, vol. 1, p. 624; *Phillimore, On Int. Law*, vol. 3, § 227; *Wildman, Int. Law*, vol. 2, pp. 216, et. seq.; *Manning, Law of Nations*, p. 305; *Ortolan, Diplomatie de la Mer*, liv. 3, ch. 6; *Garden, De Diplomatie*, liv. 7, § 4; *Heffter, Droit International*, § 161; *Nau Volkerseerecht*, §§ 193, et seq.; *Jacobson, Seerecht, etc.*, pp. 422, 423; *Pando, Derecho Internacional*, p. 496; *Hautefeuille, Des Nations Neutres*, tit. 8, sec. 1; *Bello, Derecho Internacional*, pt. 2, cap. 8, § 4; *Poehls, Seerecht, etc.*, b. 4, p. 1104; *Kaltenborn, Seerecht*, b. 2, p. 420.)

§ 3. By the ancient laws of war, as established by the usages of European nations, the contraband cargo affected the ship, and involved it in the sentence of condemnation. The justice of this rule is vindicated by Bynkershoek and Heineccius, and it cannot be said that the penalty was unjust in itself, or unsupported by the analogies of the law. Grotius does not particularly discuss the case of the ship carrying contraband, but alludes to the subject in very general terms. Soon after this time, a relaxation began to be introduced into treaties, but this relaxation, at first, applied only to cases in which the owner of the vessel might be supposed to be a stranger to the transaction. Subsequently, the stipulation in treaties became more general, although the relaxation was directed, in its particular application, as well as in its origin, only to such cases as afford a presumption that the owner was innocent, or the master deceived. (*Kent, Com. on Am. Law*, vol. 1, pp. 135, 136; *Bynkershoek, Quaest. Jur. Pub.*, lib. 1, cap. 10; *Heineccius, De Nov., etc.*, cap. 2, § 6; *Grotius, De Jur. Bel. ac Pac.*, lib. 3, cap. 1; *The Franklin*, 3 Rob. Rep., p. 221, note; *Duer, On Insurance*, vol. 1, p. 624; *Heffter, Droit International*, § 161; *Manning, Law of Nations*, p. 309; *The Ringende Jacob*, 1 Rob. Rep., p. 90; *The Mercurius*, 1 Rob. Rep., p. 288, note; *Ortolan, Diplomatie de la Mer*, tome 2, ch. 6.)



§ 4. By the modern practice of the prize courts of England and the United States, and not opposed, it is believed, by other nations, a milder rule has been adopted, and the carrying of articles contraband of war is now attended only with the loss of freight and expenses, except where the ships belong to the owner of the contraband cargo, or where the simple misconduct of carrying contraband articles, is connected with other circumstances which extend the offense to the ship also. Sir William Scott says, "Anciently, the carrying of contraband did, in ordinary cases, affect the ship, and although a relaxation has taken place, it is a relaxation, the benefit of which can only be claimed by fair cases. The aggravation of fraud justifies additional penalties." (*Phillimore, On Int. Law*, vol. 3, § 275; *Wildman, Int. Law*, vol. 2, pp. 216, 217; *Polson, Law of Nations*, p. 64; *Duer, On Insurance*, vol. 1, p. 624; *The Ringende Jacob*, 1 Rob. Rep., p. 89; *The Mercurius*, 1 Rob. Rep., p. 288; *The Jonge Tobias*, 1 Rob. Rep., p. 329; *The Franklin*, 3 Rob. Rep., p. 217; *The Neptunus*, 3 Rob. Rep., p. 108; *The Jonge Margaretha*, 1 Rob. Rep., p. 189; *The Sarah Christina*, 1 Rob. Rep., p. 242; *Manning, Law of Nations*, pp. 309, et seq.)

§ 5. Where the transportation of the contraband articles is prohibited by the stipulations of a treaty, to which the government of the neutral ship-owner is a party, the forfeiture of the freight is extended to the ship, on the ground that the criminality of the act is enhanced by the violation of the additional duty imposed by the treaty. An attempt to conceal the destination of the ship, by false papers, will lead to the same result. "I desire it to be considered as the settled rule of law received by this court," says Sir William Scott, in the case of *The Franklin*, "that the carriage of contraband with a false destination, will work a condemnation of the ship as well as the cargo." There are other cases of misconduct which are held by the courts to involve the confiscation of the ship carrying contraband; as the privity of the owner of the ship to the contraband; the concealment of the contraband in the outward voyage; the misconduct of the supercargo—the agent of the owner; the contraband traffic of the officer placed in command of a private vessel by the board of admiralty, and where the owner of the contra-

band is also owner, or part owner of the ship. But these cases will be more particularly discussed in the chapter on violation of neutral duties. (*Wildman, Int. Law*, vol. 2, pp. 216–218; *Phillimore, On Int. Law*, vol. 3, § 276; *Duer, On Insurance*, vol. 1, p. 625; *The Mercurius*, 1 Rob. Rep., p. 288, note; *The Jonge Tobias*, 1 Rob. Rep., p. 329; *The Ringende Jacob*, 1 Rob. Rep., p. 91; *The Baltic*, 1 Acton, Rep., p. 25; *Bluwitt v. Hill*, 18 East Rep., p. 13; *The Floreot Commercium*, 3 Rob. Rep., p. 178; *The Neutralitet*, 3 Rob. Rep., p. 295; *The Enrom*, 2 Rob. Rep., p. 6; *The Franklin*, 3 Rob. Rep., p. 221, note; *The Ranger*, 6 Rob. Rep., p. 125; *The Edward*, 4. Rob. Rep., p. 68.)

§ 6. The ordinary penalty of carrying articles contraband of war, is the confiscation of the goods and the loss of the freight and expenses to the ship. This penalty is not to be averted by the allegation that the owners or master were ignorant of the true nature of the articles, or that, by the threat or violence of the enemy, they were compelled to receive and transport them. Such excuses, if allowed, would be constantly urged, and by robbing the prohibition of contraband of its penal character, would convert it into a mere nugatory threat. Where the cargo does not wholly consist of contraband goods, the innocent articles of innocent shippers are restored; but all the goods of the owner of the contraband articles, even those which are innocent, share the same fate. (*Duer, On Insurance*, vol. 1, p. 625; *Phillimore, On Int. Law*, vol. 3, § 275; *Ortolan, Diplomatie de la Mer*, tome 2, ch. 6; *Manning, Law of Nations*, pp. 308, 309; *The Oster Resoer*, 4 Rob. Rep., p. 199; *The Caroline*, 4 Rob. Rep., p. 260; *The Richmond*, 5 Rob. Rep., p. 325; *The Charlotte*, 5 Rob. Rep., p. 275; *Heffter, Droit International*, § 161; *Bello, Derecho Internacional*, pt. 2, cap. 8, § 4; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 15.)

§ 7. The inception of the voyage is held to complete the offense; and from the moment that the vessel, with the contraband articles on board, quits her port on a hostile destination, the capture may be legally made. It is by no means necessary to wait till the ship and goods are actually endeavoring to enter the enemy's port. The voyage being illegal

at its commencement, the penalty immediately attaches, and continues to the end of the voyage, or at least so long as the illegality exists. (*Wildman, Int. Law*, vol. 2, p. 218; *Duer, On Insurance*, vol. 1, p. 626; *Ortolan, Diplomatie de la Mer*, tome 2, ch. 6; *The Imina*, 3 Rob. Rep., p. 168; *The Trende Sostre*, 6 Rob. Rep., p. 390, note.)

§ 8. Where the contraband goods are not taken *in delicto*, in the actual prosecution of the outward voyage, and the return voyage is distinct and independent, the penalty is not generally held to attach, either upon the proceeds of the goods or on the ship upon her return voyage. But where they are both inseparably connected in their original plan, so as to form parts of a continuous voyage, the penalty is generally considered as attaching in every stage till its final completion. Such is the doctrine established by the decisions of the English admiralty, and seemingly admitted by the supreme court of the United States. Mr. Wheaton has questioned its soundness, but his objection, that *it extends the offense indefinitely*, is completely answered by the decisions themselves, which expressly limit the offense and its penal consequences to completion of the *entire* voyage. Ortolan contests this rule of the continuation of the offense during the return voyage, on the ground that the ship should, in all cases, be exempted from any penalty, and the confiscation confined to the contraband articles. He has supported his doctrine by strong and logical arguments, but, however correct it may be in theory, it is not supported by the practice of the great maritime powers of the world. The general rule of exemption is, undoubtedly, well established, but the exceptions indicated are supported by good authorities, and generally admitted in practice. (*Hubner, De la Saisie des Bâtiments*, liv. 2, ch. 4, § 4; *Hienecius, De Novibus*, cap. 2, §§ 3, 4; *Zouch, Juris et Jur. Feccialis*, p. 2, cap. 8; *Albericus Gentilis, Hispan. Advoc.*, lib. 1, cap. 20; *Bynkershoek, Quaest Jur. Pub.*, lib. 1, cap. 12; *Manning, Law of Nations*, p. 309; *Reddie, Researches, etc.*, vol. 2, p. 568; *Wildman. Int. Law*, vol. 2, p. 218; *Duer, On Insurance*, vol. 1, pp. 626, 627; *Kent, Com. on Am. Law*, vol. 1, p. 151, note; *Wheaton, On Captures*, p. 183; *The Imina*, 3 Rob. Rep., p. 158; *The Nancy*, 3 Rob. Rep., p. 127; *The Rosalie and Betty*, 2 Rob. Rep., p. 348; *The Baltic*, 1 Act. Rep., p. 25; *The Joseph*,

8 Cranch. Rep., p. 451; *The Caledonia*, 1 Wheaton Rep., p. 100; *Christiansberg*, 6 Rob. Rep., p. 381; *Carrington v. The M. Ins. Co.*, 8 Peters. Rep., p. 521; *The Frederick Molke*, 1 Rob. Rep., p. 87; *The Charlotte*, 1 Rob. Rep., p. 386; *The Margaret*, 1 Act. Rep., p. 133; *Polson*, *Law of Nations*, p. 54; *Ortolan*, *Diplomatie de la Mer*, liv. 3, ch. 6; *Bello*, *Derecho Internacional*, pt. 2, cap. 8, § 4.)

§ 9. It must be observed that the offense does not necessarily continue during the entire outward voyage, even where it was completed by the mere inception with contraband articles on board. "Where there is positive evidence," says Duer, "that, previous to the capture, the voyage had been changed, by the substitution of an innocent port of destination, or that the original port, by capitulation or otherwise, had ceased to be hostile, as the goods were not contraband when seized, the capture is invalid, and restitution is decreed." Although the penalty is not averted by the possibility that the intention to prosecute an illegal voyage, which is in the progress of execution, will be changed before its completion, yet, if the intention, when the capture was made, had, in good faith, been abandoned, or was no longer capable of execution, the *corpus delicti* is extinguished, and the penalty cannot be sustained. (*Duer*, *On Insurance*, vol. 1, pp. 629, 571, 572; *Wildman*, *Int. Law*, vol. 2, p. 218; *The Imina*, 3 Rob. Rep., p. 167; *The Trende Sostre*, 6 Rob. Rep., p. 390, note.)

§ 10. The illegality of the transportation of contraband goods is not confined to an original importation into an enemy's country. The transportation of such articles from one port of the enemy to another, is equally unlawful, and is subject to be treated in the same manner of an original importation. It may equally and as directly tend to assist the enemy in the prosecution of the war. "The transfer of contraband from one port of a country to another," says Sir William Scott, "is subject to be treated in the same manner as an original importation into the country itself." (*Heffter*, *Droit International*, § 161; *Wildman*, *Int. Law*, vol. 2, p. 211; *Duer*, *On Insurance*, vol. 1, pp. 629, 630; *The Edward*, 4 Rob. Rep., p. 70.)

§ 11. In order to constitute the unlawfulness of the transportation of contraband, it is not necessary that the immediate destination of the ship and cargo should be to an enemy's country or port. If the goods are contraband and destined for the direct use of the enemy's army or navy, the transportation is illegal, and subject to the ordinary penalty. Thus, if an enemy's fleet be lying, in time of war, in a neutral port, and a neutral vessel should carry contraband goods to that port, not intended for sale in the neutral market, but destined to the exclusive supply of the hostile forces, such conduct would be a direct interposition in the war by furnishing essential aid in its prosecution, and consequently would be a flagrant departure from the duties of neutrality. (*Duer, On Insurance*, vol. 1, p. 680; *The Commercen*, 1 Wheaton Rep., pp. 388, 389; *Wheaton, Elem. Int. Law*, pt. 4, ch. 8, § 26.)

§ 12. In the case of *The Commercen*, a Swedish vessel captured by an American cruiser in the act of carrying a cargo of barley and oats, for the supply of the allied armies in the Spanish peninsula, the United States being at war with Great Britain, but at peace with Sweden and the other powers allied against France, the supreme court of the United States held that the voyage was illegal, the cargo was condemned, and the neutral carrier denied his freight. The cargo, in this case, was enemy's property, but all the members of the court concurred in the principle that a neutral carrying supplies for the enemy's naval, or military forces, was engaged in an illicit voyage inconsistent with the duties of neutrality, and that it was a very lenient administration of justice to confine the penalty to a mere denial of freight. Some doubts have arisen as to the propriety of the decision in the particular case, but none as to the truth of the general principles upon which it was founded. Chief Justice Marshall dissented from the majority of the court, but his dissent was founded on the special circumstances of the case: first, that the war in the Spanish peninsula was so distinct from that between England and the United States, that the latter could not be prejudiced by the aid furnished; and, second, that Sweden being an ally with England in the war against France, her subjects might lawfully aid the British forces

engaged in that war, and without violating their neutrality toward the United States. (*Wheaton, Elem. Int. Law*, pt. 4, ch. 3, § 26; *Duer, On Insurance*, vol. 1, p. 681; *Webster, The Works of*, vol. 6, p. 452; *The Commercen*, 1 *Wheaton Rep.*, p. 322.)

§ 13. All writers on international law are agreed, that implements and munitions of war, and articles, which, in their actual condition, are of immediate use for warlike purposes, are to be deemed contraband, whenever they are destined to an enemy's country, or to an enemy's use; but, beyond this, there is such a diversity of opinion among text-writers that it is exceedingly difficult, if not impossible, to deduce from such works any well established and satisfactory principles to guide our decision on the points in dispute. We will proceed to refer to the discussions of publicists of the highest authority on these questions, without attempting, however, to reconcile their differences of opinion. (*Kent, Com. on Am. Law*, vol. 1, p. 135; *Wheaton, Elem. Int. Law*, pt. 4, ch. 3, § 26; *Duer, On Insurance*, vol. 1, p. 681; *Phillimore, On Int. Law*, vol. 3, § 229; *Munning, Law of Nations*, p. 301; *Heffler, Droit International*, § 160; *Jouffroy, Droit Marit.*, pp. 130, 134; *Ortolan, Diplomatie de la Mer.*, liv. 8, ch. 6; *Hautefeuille, Des Nations Neutres*, tit. 8, sec. 2; *Bello, Derecho Internacional*, pt. 2, cap. 8, § 4; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 15; *Bynkershoek, Quaest Jur. Pub.*, lib. 1, cap. 10; *Klüber, Droit des Gens Moderne*, § 288; *De Cussy, Droit Maritime*, liv. 1, tit. 3, § 14; *Lampredi, Commerce des Neutres*, pt. 1, § 9.)

§ 14. Grotius divides all articles of trade into three classes: 1st, Implements and materials which, by their nature, are suitable to be used in war; 2d, Articles of taste and luxury, useful only for civil purposes, as books, paintings, etc.; 3d, Articles which are of indiscriminate use in peace and war, as provisions, naval stores, etc. Articles of the *first* class are always contraband; those of the *second* class never; those of the *third* class may or may not be contraband, according to the particular circumstances of the war. But little objection can be made to this classification, but it leaves the entire difficulty unsettled, as the question immediately arises with respect to what articles are to be assigned to each class, and

under what particular circumstances articles of the third class are subject to capture as contraband of war. Loccenius is of opinion that provisions are universally contraband, and refers to many instances in which different nations had enforced the prohibition. Heineccius includes in the list of contraband articles of promiscuous use in peace or war, such as provisions, naval stores, etc. Vattel makes a similar distinction to that of Grotius, though he includes timber or naval stores among articles which are liable to capture as contraband, and considers provisions as such only under certain circumstances, as "when there are hopes of reducing the enemy by famine." Valin and Pothier wholly exclude provisions, but admit that by general usage, when they wrote, naval stores were prohibited. Bynkershoek strenuously contends against admitting into the list of contraband, articles of promiscuous use in peace and war, and denies that any other than those which in their actual state, are immediately applicable to warlike purpose, can properly be enumerated as prohibited. Sir Leoline Jenkins, in a letter to Charles II., says: "I am humbly of opinion, that nothing ought to be judged contraband, by the general law of nations, but what is directly and immediately subservient to the uses of war, except it be in the case of besieged places." (*Phillimore, On Int. Law*, vol. 3, §§ 235, et seq.; *Duer, On Insurance*, vol. 1, pp. 632-634; *Wheaton, Elem. Int. Law*, pt. 4, ch. 8, § 26; *Grotius, De Jur. Bel. ac Pac.*, lib. 3, cap. 1, § 5; *Loccenius, De Jur. Marit.*, lib. 1, cap. 4, § 9; *Heineccius, De Navibus*, cap. 1, § 14; *Vattel, Droit des Gens*, liv. 3, ch. 7, § 112; *Valin, Com. sur l'Ord.*, liv. 3, tit. 9, art. 11; *Bynkershoek, Quaest. Jur. Bel.*, liv. 1, cap. 10; *Wildman, Int. Law*, vol. 2, p. 210; *Manning, Law of Nations*, p. 282; *Heffter, Droit International*, § 160; *Bello, Derecho Internacional*, pt. 2, cap. 8, § 4; *Hautefeuille, Des Nations Neutres*, tit. 8, sec. 2.)

§ 15. The more modern treatises on the law of nations present an almost equal diversity of sentiment on this subject. Kent, Wheaton and Duer have generally limited their remarks to stating the opinions of the older text-writers, and the decisions of English and American courts of prize. Wheaton is evidently disposed to exclude entirely from the list of contraband, provisions and other articles of promiscuous

uous use. Kent and Duer are of opinion that such articles may, or may not, be contraband, according to the circumstances of the case. English authors have generally favored the views of their government in its extension of the list of contraband to all articles of promiscuous use in peace and war. One of their latest text-writers, Reddie, defines contraband to be: "1. Articles which have been constructed, fabricated, or compounded into actual instruments of war; 2. Articles which from their nature, qualities and quantities, are applicable and useful for the purposes of war; 3. Articles which, although not subservient generally to the purposes of war, such as grain, flour, provisions, naval stores, become so by their special and direct destination for such purposes, namely, by their destination for the supply of armies, garrisons or fleets, naval arsenals, and posts of military equipment." The continental writers, generally, contend against the English extension of contraband. Among the most recent are Hautefeuille and Ortolan. The former admits but one class of contraband, and confines it to objects of first necessity for war, which are exclusively useful in war, and which can be directly employed for that purpose, without undergoing any change. The latter declares his opinion to be, that, on principle, under ordinary circumstances, arms and munitions of war, which serve directly and exclusively for belligerent purposes, are alone contraband. He admits that, in special cases, certain determinate articles, whose usefulness is greater in war than in peace, are, from circumstances, in their character contraband, without being actually arms and munitions of war; such as timber, evidently intended for the construction of ships of war, or for gun-carriages, boilers or machinery for the enemy's steam vessels, sulphur, saltpetre, or other materials for arms or munitions of war. Phillimore reviews the whole question, and considers that provisions may or may not be contraband, according to their destination and probable use. Heffter is of opinion that certain articles, as provisions, not in their nature contraband, may, in certain cases, from their destination and intended use, be regarded as such. (*De Cussy, Droit Maritime*, liv. 1, tit. 3, § 14; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 15; *Manning, Law of Nations*, pp. 282, et seq.; *Whea-*



ton, *Elem. Int. Law*, pt. 4, ch. 3, § 26; Kent, *Com. on Am. Law*, vol. 1, pp. 135-143; Duer, *On Insurance*, vol. 1, pp. 622-644; Reddie, *Researches Hist. and Crit. in Mart. Int. Law*, vol. 2, p. 456; Hautefeuille, *Des Nations Neutres*, tit. 8, sec. 2; Ortolan, *Dip. de la Mer.*, tome 2, ch. 6; Phillimore, *On Int. Law*, vol. 3, §§ 245, et seq.; Wildman, *Int. Law*, vol. 2, pp. 210, et seq.; Pistoye et Duverdy, *Traité des Prises*, tit. 6, ch. 2, sec. 3; Heffter, *Droit International*, § 160; Bello, *Derecho Internacional*, pt. 2, cap. 8, § 4.)

§ 16. And the same discordancy in the definition of contraband is to be found in the conventional law of nations, as established by treaties, the provisions of which are various and contradictory,—even of those made, at different periods, between the same nations. The same may be said of marine ordinances and diplomatic discussions. The marine ordinances of Louis XIV., 1681, limits contraband to munitions of war. So, also, the treaties between England and Sweden in 1656, 1661, 1664 and 1665. Bynkershoek refers to other treaties of the seventeenth century, as containing the same limitation. But Valin says that in the treaty of commerce between France and Denmark, in 1742, pitch, tar, resin, sail-cloth, hemp, cordage, masts and ship-timber, were declared to be contraband. By the treaty of Utrecht, in 1713, and the subsequent treaties of 1748, 1763, 1783, and 1786, between Great Britain and France, contraband was strictly confined to munitions of war; all other goods not worked into the form of any instrument or furniture for warlike use, by land or sea, are expressly excluded from this list. But the contraband character of naval stores continued a vexed question between Great Britain and the Baltic powers. By the treaty of 1801, between Great Britain and Russia, to which Denmark and Sweden subsequently acceded, saltpetre, sulphur, saddles and bridles, were enumerated as contraband; and by the convention of July 25th, 1803, the list was augmented by the addition of coined money, horses, equipments for cavalry, and all manufactured articles serving immediately for the equipment of ships of war. In the treaty of 1794, between Great Britain and the United States, it was stipulated (article 18,) that under the denomination of contraband should be comprised all arms and implements serving for the purposes

of war, "and also timber for ship-building, tar or rosin, copper in sheets, sails, hemp and cordage, and generally whatever may serve directly to the equipment of vessels, unwrought iron and fir planks only excepted." The article then goes on to provide, that "*whereas the difficulty of agreeing on the precise cases, in which alone provisions and other articles, not generally contraband, may be regarded as such,* renders it expedient to provide against the inconveniences and misunderstandings which might thence arise, it is further agreed that whenever any such articles, *so becoming contraband, according to the existing law of nations,* shall, for that reason, be seized," etc., the owners thereof shall be paid their value, etc. (*Merlin, Répertoire, verb. Prise Maritime*, § 3, art. 3; *Wheaton, Elem. Int. Law*, pt. 4, ch. 3, § 24; *Wheaton, Hist. Law of Nations*, pp. 115, 126–134, 375–401; *Valin, Comm. sur l'Ord.* liv. 3, tit. 9; *Phillimore, On Int. Law*, vol. 3, §§ 243, et seq.; *Wildman, Int. Law*, vol. 2, pp. 222, et seq.; *Manning, Law of Nations*, pp. 283, et seq.; *Ortolan, Diplomatie de la Mer*, liv. 3, ch. 6; *Pis-toye et Duverdy, Traité des Prises*, tit. 6, ch. 2, sec. 3; *Heffter, Droit International*, § 160; *Lampredi, Commerce des Neutres*, pt. 1, § 8.)

§ 17. The numerous treaties to which the United States have been parties, and which contain any stipulations respecting contraband, with the single exception of the one just referred to with England, in 1794, confine the term to arms and munitions of war, and in the early ones, naval stores are, in express terms, excluded from the list. The more modern treaties between European powers, are not calculated to throw much light upon this subject. The declarations of the French and English governments, at the commencement of the war with Russia, in 1854, except *contraband of war* from the articles to which impunity is accorded, but they contain no new definition of contraband. But the British order, in council of February 18th, 1854, issued in anticipation of the declaration of war, prohibits from being exported or carried coastwise, "all arms, ammunition and gun powder, military and naval stores, and the following articles, being articles which are judged capable of being converted into, or made useful in increasing the quantity of military or naval stores, that is to say, marine engines, screw propellers, paddle

wheels, cylinders, cranks, shafts, boilers, tubes for boilers, boiler plates, fire bars, and every article or any other component part of an engine or boiler, or any article whatever, which is, or can, or may become applicable for the manufacture of marine machinery." Although this order, and its subsequent modification, was probably not intended as a fresh declaration of contraband of war, yet it was evident, from the character of the order itself, and from answers given by the ministers in the house of commons, that the parts and elements of steam machinery, and also coals, were to be regarded as articles *ancipitis usus*, not necessarily contraband, but liable to be considered so, if they were to be applied to the military or naval uses of the enemy. A Swedish ordinance, of April 8th, 1854, section fifth, enumerates as contraband of war, all kinds of arms, munitions of war, military stores, saddles, bridles, and other manufactured articles, immediately applicable to warlike purposes. (*U. S. Statutes at Large*, vol. 8, passim; *Wheaton, Elem. Int. Law*, pt. 4, ch. 3, § 24; *Edinburg Review*, No. 203, July, 1854; *Ortolan, Diplomatie de la Mer*, tome 2, ch. 6; *Heffter, Droit International*, § 160.)

§ 18. Again, if we recur to the decisions of prize courts, although we shall find less discordancy, perhaps, than in the other sources of international law, we nevertheless shall encounter a diversity of sentiment, on some points, which it would be vain to attempt to reconcile. Even in the same country, at different periods, the decisions have been various and contradictory. Thus, in England, Sir Leoline Jenkins, the judge of admiralty in the reign of Charles II., 1674, in the case of a Swedish vessel, laden with naval stores, already referred to, decided that such commodities as pitch, tar, and naval stores, except in case of besieged places, ought not to be judged contraband; while Sir William Scott condemned naval stores as contraband, even when bound to a mercantile port only, as "they may then be applied to immediate use in the equipment of privateers, or may be conveyed from the mercantile to the naval port, and there become subservient to every purpose to which they could have been applied, if going directly to a port of naval equipment." The same authority sustained the orders and instructions to English cruisers, to

sieze all neutral vessels laden with corn, flour, meal, and other provisions, bound to ports of France, upon the ground that by the modern law of nations, all provisions are to be considered contraband, and, as such, liable to confiscation, whenever the depriving the enemy of these supplies is one of the means to be employed in reducing him to terms. (*Dalloz, Repertoire, verb. Prises Maritimes*, sec. 8, art. 2; *Merlin, Repertoire verb. Prise Maritime*, § 3, art. 3; *Pistoye, et Duverdy, Des Prises*, tit. 6, ch. 2, sec. 3; *Life and Cor. of Sir L. Jenkins*, vol. 2, p. 751; *Wheaton, Hist. Law of Nations*, p. 130; *Wheaton, Elem. Int. Law*, pt. 4, ch. 3, § 24; *The Charlotte*, 5 Rob. Rep., p. 305; *The Richmond*, 5 Rob. Rep., p. 325; *The Neptunus*, 3 Rob. Rep., p. 108.)

§ 19. As already stated, it is not our present intention to attempt to reconcile conflicting opinions and decisions, or to deduce, from any process of reasoning, the rules of an universal law applicable to contraband of war. But we will endeavor to state what has been decided to be contraband by the prize courts of Europe and of the United States, wherein the courts are generally agreed, and wherein they have differed in opinion. It is, perhaps, of as much importance to know what has been, and is likely to be, administered as the law, in the courts of the principal commercial states, as to know what *ought*, in theory, to be established as the conventional law of nations. The liability to capture can only be determined by the rules of international law, *as interpreted and applied by the tribunals of the belligerent state* to the operations of whose cruisers the neutral merchant is exposed. (*Phillimore, On Int. Law*, vol. 3, §§ 251, et seq.; *Duer, On Insurance*, vol. 1, p. 634; *Wildman, Int. Law*, vol. 2, pp. 110, et seq.; *Manning, Law of Nations*, pp. 301, 302; *Heffler, Droit International*, §§ 159, 160.)

§ 20. It is universally admitted, as already remarked, that all instruments and munitions of war are to be deemed contraband, and subject to condemnation. This rule embraces, by its terms, and by fair construction, all ordnance and arms of every description, balls, shells, shot, gunpowder, and articles of military pyrotechny, gun-carriages, ammunition-wagons, belts, scabbards, holsters, all military equipments and military clothing. Any vessel, evidently built for warlike purposes, as gun and mortar boats, and destined to be sold

for such use, is clearly liable to confiscation under the same rule. To this list is to be added all articles, manufactured or unmanufactured, which are almost exclusively used for military purposes, as machinery for manufacturing arms, and saltpetre, and sulphur for making gunpowder. (*Garden, De Diplomatie*, liv. 7, § 6; *Phillimore, On Int. Law*, vol. 3, § 229; *Duer, On Insurance*, vol. 1, p. 635; *Bynkershoek, Quaest Jur. Pub.*, lib. 1, cap. 10; *Grotius, de Jur. Bel. ac Pac.*, lib. 3, cap. 1, § 5; *Wheaton, Elem. Int. Law*, pt. 4, ch. 3, § 24; *Vattel, Droit des Gens*, liv. 3, ch. 7, § 112; *Chitty, Com. Law*, pp. 444-449; *Law of Nations*, pp. 119-128; *Heffter, Droit International*, § 110; *Bello, Derecho Internacional*, pt. 2, cap. 8, § 4; *Riquelme, Derecho Pub. Int.*, liv. 1, tit. 2, cap. 15; *Hautefeuille, Des Nations Neutres*, tit. 8, sec. 2; *Merlin, Répertoire verb. Prise Maritime*, § 3, art. 3; *De Cussy, Droit Maritime*, liv. 1, tit. 3, § 14; *Lampredi, Commerce des Neutres*, pt. 1, § 9; *Daloz, Répertoire verb. Prises Maritimes*, sec. 3, art. 2.)

§ 21. It is an established doctrine of the English admiralty, that all manufactured articles that in their natural state are fitted for military use, or for building and equipping ships of war, such as masts, spars, rudders, wheels, tillers, sails, sail-cloth, cordage, rigging and anchors, are contraband in their own nature, to the same extent as munitions of war, and that no exception is admitted in their favor, unless created by express provisions of a treaty. Since the introduction of steam, as a motive power, in ships of war, the British prize courts would probably, upon the same principle, condemn as contraband all marine engines, screw propellers, cylinders, shafts, boilers, boiler plates, tubes, fire-bars, and every component part of a marine engine or boiler, and every article suitable for the manufacture of marine machinery. (*Duer, On Insurance*, vol. 1, p. 635; *The Charlotte*, 5 Rob. Rep., p. 305; *The Neptunus*, 3 Rob. Rep., p. 108; *Wheaton, Elem. Int. Law*, pt. 4, ch. 3, § 24; *Edinburg Review*, No. 203, July, 1854; *Phillimore, On Int. Law*, vol. 3, § 234; *Polson, Law of Nations*, p. 63; *Wildman, Int. Law*, vol. 2, p. 212.)

§ 22. Articles in a rough state, which may be used for military and naval purposes, may, or may not, be contraband, according to their nature and destined use, as inferred from

their immediate destination. Thus, pitch, tar and hemp, destined to the enemy's use, are generally held to be contraband in their nature, but where they are the produce of the neutral country from which they are exported, and are the property of its subjects or citizens, they are exempt from confiscation, except when they are exclusively and immediately destined to warlike use. Ship-timber, in a rough state, is not *in se* contraband, but it may become so from its particular character, as masts and spars, or from the character of its port of destination. Copper is not generally contraband, but if in sheets, adapted to the sheathing of vessels, it is condemned. Hemp is more favorably considered than cordage. Rosin is not generally contraband, but is condemned if going to a port of naval equipment. Iron itself is treated with indulgence, but if of such a form as to make it suitable for military or naval purposes, and its immediate destination is for such use, it cannot claim the benefit of exemption. The same rule would probably be applied to all unwrought materials for ship building, and for the construction of marine machinery. Since the introduction of steam as the motive power in ships of war, the question has been much discussed in Europe, whether coals are to be considered as contraband. They would seem now to properly belong to the same class as ship-timber, tar, pitch, and other unwrought materials for ship building and naval stores. In the recent war between the allies and Russia, the English cruisers stopped coals on their way to an enemy's port on the Black sea, though it appears, from an answer already referred to, given in the house of commons by Sir James Graham, that they would be regarded by British cruisers as one of the articles *ancipitis usus*, not necessarily contraband, but liable to detention under circumstances that warrant suspicion of their being destined to the military or naval uses of the enemy. Ortolan first expressed the opinion that coals might, or might not, according to their intended use, be classed as prohibited articles; but he afterward corrected this statement, and concluded that they never can, under any circumstances, become contraband of war. This view of the question is ably advocated by Hautefeuille. (*Polson, Law of Nations*, p. 68; *Duer, On Insurance*, vol. 1, p. 686; *Heffter, Droit International*, § 160; *Wheaton, Elem. Int.*

*Law*, pt. 4, ch. 3, § 24, note; *Bello, Derecho Internacional*, pt. 2, cap. 8, § 4; *Hauteville, Des Nations Neutres*, tit. 8, sec. 2; *Ortolon, Diplomatie de la Mer*, liv. 3, ch. 6; *De Cussy, Droit Maritime*, liv. 1, tit 3, § 14; *The Staadt Embden*, 1 Rob. Rep., p. 26; *The Sarah Christina*, 1 Rob. Rep., p. 241; *The Maria*, 1 Rob. Rep., p. 372; *The Appollo*, 4 Rob. Rep., p. 158; *The Christina Maria*, 4 Rob. Rep., p. 166; *The Twee Juffrouwen*, 4 Rob. Rep., p. 244; *The Evert*, 4 Rob. Rep., p. 354; *The Nostra Signora*, 5 Rob. Rep., p. 97.)

§ 23. The probable use of articles is inferred from their known destination. This rule seems neither unjust nor unequal. The remarks of Chancellor Kent on this point are exceedingly clear and appropriate. "The most important distinction," he says, "is whether the articles were intended for the ordinary uses of life, or even for mercantile ship's use, or whether they were going with a highly probable destination to military use. The nature and quality of the port to which the articles are going, is not an irrational test. If the port be a general commercial one, it is presumed the articles are intended for civil use, though occasionally a ship of war may be constructed in that port. But, if the great predominant character of that port, like Brest in France, or Portsmouth in England, be that of a port of naval military equipment, it will be presumed that the articles were going for military use, although it is possible that the articles might have been applied to civil consumption. As it is impossible to ascertain the final use of an article *incipitis usus*, it is not an injurious rule, which deduces the final use from the immediate destination; and the presumption of a hostile use, founded on its destination to a military port, is very much inflamed, if, at the time when the articles were going, a considerable armament was notoriously preparing, to which a supply of those articles would be eminently useful." The same principle is laid down by Sir William Scott, but it does not seem to have been followed out in all his decisions. It applies equally to unwrought materials and ordinary naval stores. If, when they are destined to a *commercial* port, it is a just presumption that they are intended solely for civil use, it is evident that this presumption exists in all cases when such is their destination, from whatever country they may be

exported, and hence, in all such cases, the presumption should be admitted for their protection, as it is for their condemnation when destined to a port of naval equipment. The distinction in favor of those which are the produce of the country from which they are imported, does not seem to be well founded. (*Kent, Com. on Am. Law*, vol. 1, p. 140; *Duer, On Insurance*, vol. 1, p. 637; *The Commercen*, 1 Wheaton, Rep., p. 38; *Heffter, Droit International*, § 160; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 15.)

§ 24. It is universally admitted, that provisions (*commeatus belli*) are not, in their own nature, contraband. But while some contend that they never can become so under any circumstances, others hold, (and such is the uniform practice of the British admiralty,) that they may become liable to condemnation by their special destination and intended use. When they are destined to the immediate supply of the military or naval forces of the enemy, the aid thus intended to be given for the prosecution of the war, is so direct and important that the act of transportation is peculiarly noxious, and they are condemned without hesitation. It would seem, from the decision of the supreme court of the United States, in the case of *The Commercen*, that where the real object is the supply of the enemy's forces, the voyage is illegal, even where the port of destination is neutral in its character. Nor, by the established doctrine of the English admiralty, is it in all cases necessary, in order to make provisions contraband, that the destination to the use of the enemy's military or naval forces should be certain. The rule of *incipit usus* is here applied, which deduces the final use from the immediate destination. If destined to a general commercial port, they are presumed to be for civil use, but if to a port whose predominant character is that of naval construction and equipment, they are presumed to be for military use. But such destination alone is not, as a general rule, sufficient to produce a condemnation. It must further appear that the provisions were, from their nature and quality, adapted to military use; since, otherwise, there would be no basis for the presumption that they would have been applied to that use, had their arrival been permitted. Thus, where cheeses, intercepted as contraband, were destined to Brest, a port



notoriously of naval equipment, evidence was required by Sir William Scott of their fitness for naval use. (*Duer, On Insurance*, vol. 1, pp. 638, 639; *The Commercen*, 2 Gallis. Rep., p. 264; 1 Wheaton, Rep., p. 382; *The Jonge Margaretha*, 1 Rob. Rep., p. 196; *The Haabet*, 2 Rob. Rep., p. 182; *The Zelden Rust*, 6 Rob. Rep., p. 93; *The Ranger*, 6 Rob. Rep., p. 126; *The Edward*, 4 Rob. Rep., p. 68; *Polson, Law of Nations*, p. 63; *Ortolan, Diplomatie de la Mer*, liv. 3, ch. 6; *Manning, Law of Nations*, pp. 299, et. seq.; *Pistoye et Duxerdy, Traité des Prises*, tit. 6, ch. 2, sec. 3; *Maisonnaire v. Keating*, 2 Gallis. Rep., p. 334; *Heffter, Droit International*, § 160; *Bello, Derecho Internacional*, pt. 2, cap. 8 § 4; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 15; *Hautefeuille, Des Nations Neutres*, tit. 8, sec. 2; *Lampredi, Commerce des Neutres*, pt. 1, §§ 7, 9.

§ 25. The ancient custom of *preëmption*, by the belligerent, of the property of the subjects of another state, as practiced about the middle of the seventeenth century, had a much wider operation and very different meaning than is now attributed to it. By the French ordonnance of 1584, article sixty-nine, contraband was subjected, not to *confiscation*, but to *preëmption*. But, according to the modern use of this term, it is applied to articles not subject to confiscation, as *contraband* in themselves, but being *ambigui usûs* are made subject to seizure, and to be condemned to the use of the belligerent, he paying their value with a reasonable mercantile profit,—which, by the practice of the British prize courts, is usually fixed at ten per cent. If the goods so seized are contraband, the carrying of them is a criminal act, punishable by confiscation or any milder penalty which the belligerent may see fit to impose; but if not contraband, by the law of nations, they are not liable to preëmption. The question, therefore, resolves itself into one of contraband, upon which opinions are somewhat divided. (*Wildman, Int. Law*, vol. 2, pp. 219, et seq.; *Polson, Law of Nations*, p. 64; *Phillimore, On Int. Law*, vol. 3, §§ 267–270; *Manning, Law of Nations*, pp. 313, et seq.; *Ward, Of Contraband*, p. 196; *The Sarah Christina*, 1 Rob. Rep., p. 241; *The Haabet*, 2 Rob. Rep., p. 174; *Heffter, Droit International*, § 161; *Bello, Derecho Internacional*, pt. 2, cap. 8, § 4; *Hautefeuille, Des Nations Neutres*, tit. 7, ch. 2; *De Cussy, Droit Maritime*, liv. 1, tit. 3, § 18.)

§ 26. But the British admiralty, and especially Sir William Scott, went much further, and sustained the capture of provisions which were not even *probably* destined to military use, not, indeed, confiscating as *contraband of war* on the ground of their being *ambigui usûs*, but condemning them to the use of the British government, on the payment of a price equivalent to their value, or rather, their cost and the specified mercantile profit of ten per cent. A similar rule of *pre-emption* was applied by Great Britain to certain *native commodities* of neutral states, found in neutral vessels, and required by her for naval purposes. In some cases, where this rule of pre-emption, or pretended right of purchase, was exercised, it was not claimed that the goods so captured and condemned to a forced sale, were *contraband*, even on the ground of being *ambigui usûs*; but the right to pre-empt them was claimed, because “the *ancient* practice of Europe, or at least, of several maritime states of Europe, was, to confiscate them entirely; a century has not elapsed since this claim has been asserted by some of them.” It was not pretended, as, indeed, it could not have been, that the claim thus *asserted* by some of the maritime states of Europe a century before, was generally admitted, and adopted as a rule of international law, or that the practice ever had received any such sanction as to make it binding upon neutrals. (*Duer, On Insurance*, vol. 1, p. 640; *Wheaton, Elem. Int. Law*, pt. 4, ch. 3, § 24; *Kent, Com. on Am. Law*, vol. 1, pp. 138, 139; *Phillimore, On Int. Law*, vol. 3, §§ 267–270; *Polson, Law of Nations*, p. 64; *Wildman, Int. Law*, vol. 2, pp. 219, et seq.; *The Haabet*, 2 Rob. Rep., p. 182; *The Sarah Christina*, 1 Rob. Rep., p. 237; *Manning, Law of Nations*, p. 316; *Ortolan, Diplomatie de la Mer*, tome 2, ch. 6; *Heffter, Droit International*, § 161; *Hautefeuille, Des Nations Neutres*, tit. 7, ch. 2; *De Cussy, Droit Maritime*, liv. 1, tit. 3, §§ 14, 18.)

§ 27. The arguments adduced in favor of the British right of *pre-emption* failed to convince its opponents of its justness or legality, and its enforcement was, at the time, most strenuously opposed by the government of the United States, and the neutral powers of Europe. Nor did this opposition cease with the war in which the rule had originated, or, at least, been called into operation. Since then, text-writers

have most emphatically denied the legality of the rule, and successfully attacked the arguments by which it was attempted to be defended. Some British writers still advocate it as a principle of law, but there is little probability that in any future war the British government will attempt to exercise the right of preëmption, except upon goods manifestly contraband of war. (*De Cussy, Droit Maritime*, liv. 1, tit. 3, §§ 14, 15; *Wheaton, Elem. Int. Law*, pt. 4, ch. 3, § 24; *Duer, On Insurance*, vol. 1, p. 640; *Kent, Com. on Am. Law*, vol. 1, pp. 138, 139; *Waite, State Papers*, vol. 1, pp. 393, 398; *Manning, Law of Nations*, pp. 313–316; *Ortolan, Diplomatie de la Mer*, tome 2, ch. 6; *Heffter, Droit International*, § 161.)

§ 28. Arnould lays down the rule, that all insurances on articles contraband of war are wholly void, and incapable of being enforced in the courts of the belligerent country. But if effected by or for neutrals, and sought to be enforced in the court of a *neutral* state, the case would be different, for it is not deemed unlawful in a neutral, by his own government, to be engaged in a contraband trade. The insurance, therefore, by a neutral, of articles contraband of war, being *per se* a valid contract, may be enforced in the courts of the neutral country, *provided* the nature of the trade and of the goods was disclosed to the underwriter, *or provided* there be just ground, from the circumstances of the trade, or otherwise, to presume that he was duly informed thereof. Mr. Duer contends that the carrying of contraband, being contrary to the general law of nations, renders the voyage prohibited and illegal, and hence, that an insurance of the ship on such a voyage cannot be sustained. We copy a portion of his remarks: “An insurance,” he says, “upon goods liable to confiscation, as contraband of war, if made in the belligerent country whose rights are violated, it is admitted, by all writers, is wholly void; nor do I perceive any reason for doubting that an insurance upon every other subject or interest, liable to be involved in the same penalty, is equally invalid. Hence, a policy upon the freight of the contraband articles, upon other goods, the property of the same owner, and upon the ship, when subject to condemnation, is, in all cases, an illegal contract; for, although the penalty to which the subject is liable may not always be enforced in a court of admiralty, that court

alone seems competent to judge of the special circumstances that may warrant a discretionary relaxation of its general rules. Nor, to avoid a policy upon the ship, does it seem to be necessary that she should be placed in circumstances to justify her condemnation. The transportation of contraband, as viewed by the law of nations, is universally an unlawful act; and it is for this reason that it subjects the ship to the penalty of the loss of freight. The imposition of this penalty, it seems to me, renders the voyage prohibited and illegal: and hence, if we are governed by analogy, an insurance of the ship, on such a voyage, cannot be sustained. The arguments of a sound policy lead us to the same conclusion. It is impossible to deny that a belligerent country has a real, and, in some cases, a deep interest in preventing the transportation of contraband articles to the use of the enemy. To permit the vehicle of transportation to be insured, is to encourage the act. These reasons do not apply to an insurance upon the innocent goods of an innocent shipper, which is, doubtless, valid. He was no party to the illegal transaction, had no power to prevent it, and, it must be presumed, had no knowledge of its existence. It is, however, doubtful whether the insurer is liable even to the owner of innocent goods, for a loss arising from condemnation or detention, by his own government, of the carrier-ship." These views are contested by some of the continental publicists. (*Arnould, On Insurance*, vol. 1, p. 740; *Duer, On Insurance*, vol. 1, pp. 642, 643; *Bedarride, Droit Maritime*, §§ 1095, et seq.)

## CHAPTER XXV.

## RIGHT OF VISITATION AND SEARCH.

## CONTENTS.

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§ 1. It has been stated in a preceding chapter that every merchant vessel on the high seas is regarded, in international law, as a part of the territory of the state to which it belongs. To enter into such vessel, or to interrupt its course, by a

foreign power in time of peace, or (it being neutral,) by a belligerent in time of war, “is an act of force, and is, *prima facie*, a wrong, a trespass, which can be justified only when done for some purpose, allowed to form a sufficient justification by the law of nations.” The right of a vessel of one state to visit and search a vessel of another state on the high seas, in any case, is therefore an exception to the general rights of property, jurisdiction, equality and independence of sovereign states, and to justify such an act it must be shown that the particular case comes clearly within the exceptions to this rule which have been established by the positive law of nations, or by treaty stipulations between the parties. (*Wheaton, Elem. Int. Law*, pt. 4, ch. 3, § 18: *Webster, Dip. and Off. Papers*, p. 143; *Wildman, Int. Law*, vol. 2, p. 40; *Lawrence, Visitation and Search*, p. 4; *Hubner, Saisie de Batimens*, pt. 2, ch. 3; *Kluber, Droit des Gens Mod.*, § 293, a; *Jouffroy, Droit Maritime*, p. 213; *Heffter, Droit International*, § 167; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 7; *Hautefeuille, Des Nations Neutres*, tit. 11, ch. 1; *The Antelope*, 10 *Wheaton Rep.*, p. 66.)

§ 2. The right of *search* upon the high seas is now universally regarded as simply a belligerent right, and one which cannot be exercised in time of peace, except, when it has been conceded by treaty. Whatever difference of opinion may formerly have existed on this point, this right of search in time of peace, has more recently been entirely and utterly disclaimed by the British government—the only maritime power which was supposed to advocate it as a principle of the law of nations. This general rule, with respect to vessels on the high seas, does not, of course, apply to the execution of revenue laws or other municipal regulations in the ports and bays, or within one marine league of the coast. (*Ortolan, Diplomatie de la Mer.*, tome 2, ch. 7; *Webster, Dip. and Off. Papers*, p. 143; *Lord Aberdeen to Mr. Everett*, Dec. 20th, 1841; *Webster, Works*, vol. 6, pp. 329, et seq.; *The Antelope*, 10 *Wheaton, Rep.*, p. 66; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 7.)

§ 3. That government, however, at one time attempted to draw a distinction between the right of *visit*, and the right of *search*, and while it distinctly disavowed any claim to exercise

the latter in time of peace, it insisted upon the right of visit for the purpose of ascertaining whether a merchant vessel is justly entitled to the protection of the flag which she may happen to have hoisted, such vessel being in circumstances which render her liable to suspicion; the right "to know whether the vessel pretending to be American, and hoisting the American flag, be *bona fide* American;" and yet, says Lord Aberdeen, "if, in the exercise of this right, either from involuntary error, or in spite of every precaution, loss or injury should be sustained, a prompt reparation would be afforded." (*Webster, Dip. and Off. Papers*, pp. 163, 165; *Webster, The Works of*, vol. 6, pp. 335, et seq.; *Phillimore, On Int. Law*, vol. 3, § 326; *Lawrence, Visitation and Search*, p. 4; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 7.)

§ 4. "The government of the United States, on the other hand," said Mr. Webster, "maintains that there is no such well known and acknowledged, nor, indeed, any broad and generic difference between what has been usually called visit, and what has been usually called search; that the right to visit, to be effectual, must come, in the end, to include search; and thus to exercise, in peace, an authority which the law of nations only allows in time of war. If such well known distinction exists, where are the proofs of it? What writers of authority on public law, what adjudications in courts of admiralty, what public treaties, recognize it? No such recognition has presented itself to the government of the United States; but, on the contrary, it understands that public writers, courts of law, and solemn treaties have, for two centuries, used the words 'visit' and 'search' in the same sense. What Great Britain and the United States mean by the 'right of search,' in its broadest sense, is called by continental writers and jurists, by no other name than the 'right of visit.' Visit, therefore, as it has been understood, implies not only a right to inquire into the national character, but to detain the vessel, to stop the progress of the voyage, to examine papers, to decide on their regularity and authenticity, and to make inquisition on board for enemy's property, and into the business which the vessel is engaged in. In other words, it describes the entire right of belligerent visitation and search. Such a right is justly disclaimed by the British government,

in time of peace. They, nevertheless, insist on a right which they denominate a right of visit, and by that word describe the claim which they assert." Mr. Webster thus describes the views of the United States, on the means which a vessel of war may use in time of peace, to ascertain the character of any other vessel on the high seas. "As we understand the general and settled rules of public law, in respect to ships of war sailing under the authority of their government, "to arrest pirates and other public offenders," there is no reason why they may not approach any vessel descried at sea, for the purpose of ascertaining their real characters. Such a right of approach seems indispensable for the fair and discreet exercise of their authority; and the use of it cannot be justly deemed indicative of any design to insult or injure those they approach, or to impede them in their lawful commerce. On the other hand, it is clear that no ship is, under such circumstances, bound to lie by, or wait the approach of any other ship. She is at full liberty to pursue her voyage, in her own way, and to use all necessary precautions to avoid any suspected sinister enterprise or hostile attack. Her right to the free use of the ocean, is as perfect as that of any other ship. An entire equality is presumed to exist. She has a right to consult her own safety, but, at the same time, she must take care not to violate the rights of others. She may use any precautions dictated by the prudence or fears of her officers, either as to delay, or the progress or course of her voyage, but she is not at liberty to inflict injuries upon other innocent parties, simply because of her conjectural dangers. But if the vessel thus approached attempts to avoid the vessel approaching, or does not comply with her commander's order, to send him her papers for his inspection, nor consent to be visited or detained, what is next to be done? Is force to be used? And if force be used, may that force be lawfully repelled? \* \* \* Suppose that force be met by force, gun returned for gun, and the commander of the cruiser, or one of his seamen, be killed, what description of offense will have been committed? It may be said in behalf of the commander of the cruiser, that he mistook the vessel for a vessel of England, Brazil, or Portugal; but does this mistake of his, take away from the



American vessel the right of self-defense? The writers of authority declare it to be a principle of natural law, that the principle of self-defense exists against an assailant who mistakes the object of his attack for another whom he had the right to assail." He also discussed the consequences of admitting the claim as a matter of *right*, for, if a *right*, it had its correlative *duties*. (*Webster, Dip. and Off. Papers*, pp. 164, 165, 166, 167; *Webster, The Works of*, vol. 6, pp. 335, 336, 338, 339; *Phillimore, On Int. Law*, vol. 3, § 328; *Bello, Derecho Internacional*, pt. 2, cap. 8, § 10; *Lawrence, Visitation and Search*, p. 61; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 7; *Wheaton, Hist. Law of Nations*, pp. 706, et seq.)

§ 5. The views of Mr. Webster on this question are fully sustained by the best writers on public law in America and Europe. Chancellor Kent says most emphatically, that the right of visitation and search "is strictly and exclusively a war right, and does not rightfully exist in time of peace, unless conceded by treaty." He, however, concedes the *right of approach*, (as described by the supreme court of the United States in *The Marianna Flora*,) "for the sole purpose of ascertaining the real national character of the vessel sailing under suspicious circumstances." With respect to the right of *visit in time of peace*, claimed by the English government, Mr. Wheaton defied the British admiralty lawyers, "to show a single passage of any institutional writer on public law, or the judgment of any court by which that law is administered, either in Europe or America, which will justify the exercise of such a right on the high seas in time of peace." \* \* \* "The distinction now set up, between a right of *visitation* and a right of *search*, is nowhere alluded to by any public jurist, as being founded on the law of nations. The technical term of *visitation and search*, used by the English civilians, is exactly synonymous with the *droit de visite* of the continental civilians. The right of seizure for a breach of the revenue laws, or laws of trade and navigation, of a particular nation, is quite different. The utmost length to which the exercise of this right on the high seas has ever been carried, in respect to the vessels of another nation, has been to justify seizing them within the territorial jurisdiction of the state against whose laws they offend, and pursuing them, in

case of flight, seizing them upon the ocean, and bringing them in for adjudication before the tribunals of that state. This, however, says the supreme court of the United States, in the case of *The Marianna Flora*, has never been supposed to draw after it any right of visitation or search. The party, in such case, seizes at his peril. If he establishes the forfeiture, he is justified." Mr. Justice Story, delivering the opinion of the supreme court, in the case of *The Marianna Flora*, says, that the right of visitation and search does not belong, in time of peace, to the public ships of any nation. "This right is strictly a belligerent right, allowed by the general consent of nations in time of war, and limited to those occasions." "Upon the ocean, then, in time of peace, all possess an entire equality. It is the common highway of all, appropriated to the use of all, and no one can vindicate to himself a superior exclusive prerogative there. Every ship sails there with the unquestionable right of pursuing her own lawful business without interruption." (*Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 7; *Kent, Com. on Am. Law*, vol. 1, p. 153; *Wheaton, Elem. Int. Law*, Introduction, by Lawrence, p. cxxiv.; *The Marianna Flora*, 11 Wheaton Rep., p. 42; *Lawrence, Visitation and Search*, p. 61.)

§6. The older continental publicists, as stated by Mr. Wheaton, do not distinguish between the right of *visit*, and the right of *search*, but discuss the general question under the terms *visit* and *visitation*, as a belligerent right, existing only in time of war. Several, however, who have written since Mr. Wheaton made the statement alluded to, have discussed the claim of Great Britain to the right of *visit* in time of peace, as distinguished from the general right of *visitation* and *search* in time of war. We refer particularly to the recent and able works of Massé, Ortolan, Hautefeuille, and Pistoye et Duverdy. Massé says, "Whatever may be the object of visit in time of peace, it is always an act of police which cannot be exercised by one nation over another, for this act would imply, on the part of the visitor, a sovereignty incompatible with the reciprocal independence of nations (*peuples*)." Ortolan distinguishes the right of ships of war to ascertain the nationality of a merchantman, (*droit d'enquête du pavillon*), from the right of visitation or search,

(*droit de visite ou de recherche*.) Signals, exchange of words, suffice with respect to the nationality of the flag, except on suspicion of piracy, when all further proceedings must be taken at the risk of the man-of-war. He unites with Mr. Wheaton in declaring that the right of visitation or search does not exist except in time of war. If accorded in time of peace by special conventions between particular states, such treaty stipulations do not bind those who are not parties to them, nor do they make it a part of the law of nations. Hautefeuille discusses the British pretensions at great length. He agrees with Ortolan with respect to the right of ships of war to ascertain the nationality of a merchantman by approaching them and requiring them to hoist their flag. But beyond this simple fact of showing colors, he denies any *droit d'enquete* in time of peace, except in the case of suspected piracy, which in modern times very rarely occurs. Even then the visiting vessel proceeds at her peril, for if her suspicions are not verified, she becomes guilty of an illegal act toward the vessel visited. All three of these writers oppose the policy of granting this right in time of peace by treaty, as a measure most dangerous to maritime commerce; Hautefeuille, and Ortolan do not hesitate to declare that such treaties are not in general binding even upon the subjects of the states making them, for the reason that they are virtually a surrender of sovereignty. Pistoye et Duverdy regard the right of reciprocal visit (*droit de visite réciproque*) in time of peace for the suppression of the slave trade, as one which results only from special convention or treaty, and they refer to the treaties between France and England, of November 30th, 1831, March 22d, 1833, May 20th, 1845; the convention between France and Sweden, and Norway, May 21st, 1833; the treaty between France and Sardinia, December 8th, 1834; between France and the Two Sicilies, February 14th, 1838; France and Tuscany, November 27th, 1837; and the convention between France and Hayti, August 9th, 1840. We know of no continental writer who advocates or admits a right of visit, in time of peace, except in the single case of vessels suspected of piracy. (Ortolan, *Diplomatie de la Mer*, liv. 3, ch. 2, § 15, Hautefeuille, *Des Nations Neutres*, tit. 11, ch. 2; Pistoye et Duverdy, *Des Prises*, tit. 1, ch. 3, sec. 2;

*Massé, Droit Commercial*, liv. 2, tit. 1, c. 2, § 2; *De Cussy, Droit Maritime*, tome 2, pp. 364, 385; *Heffler, Droit International*, § 168; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 7.)

§ 7. The older English writers, and English judicial decisions, are directly opposed to the pretensions of Lord Aberdeen, and generally agree with the continental writers on this question. Lord Stowell, than whom no greater authority can be found in British maritime jurisprudence, says: "I can find no authority that gives a right to the interruption of the navigation of the vessels of states on the high seas, except that which the rights of war give to both belligerents against neutrals." Again he says: "No one can exercise the right of visitation and search upon the high seas, except a belligerent power. No such right has ever been claimed, nor can it be exercised without the suppression, interruption and the endangering of the relations with and the lawful navigation of other countries. If the right were to exist at all, it must be universal and extend equally to all countries. If I were to proceed to consider this question further, it would be necessary for me to state the gigantic mischiefs which such a claim is likely to produce." And, again: "All nations being equal, all have an equal right to the uninterrupted use of the ocean for their navigation. In places where no legal authority exists, where the subjects of all states meet upon the footing of entire equality and independence, no one state or any of its subjects have a right to assume or to exercise any authority over the subjects of another." But some recent British writers, and among them Mr. Phillimore, have attempted to sustain the views of Lord Aberdeen. Mr. Phillimore has argued the question at considerable length. He says, "It is quite true that the right of *visit and search* is strictly a belligerent right. But the right of visit in time of peace for the *purpose of ascertaining the nationality of a vessel*, is a part, indeed, but a very small part, of the belligerent right of visit and search." He then quotes the words of Bynkershoek, "*Velim animadvertas, eatenus utique licitum esse amicum navem sistere, ut non ex fallaci forte aplustri, sed ex ipsis instrumentis in navi repertis constet, navem amicam esse,*" and adds, "Surely this reasoning applies to the right of ascertaining the national

character of a suspected pirate in time of peace ; and it may be added, that it appears to have been so considered by no less a jurist than Mr. Chancellor Kent." The words of Bynkershoek are thus translated by Mr. Duponceau: "But it ought to be observed, that it is lawful to detain a *neutral* vessel, in order to ascertain, not by the flag merely, which may be fraudulently assumed, but by the documents themselves which are on board, whether she is really *neutral*." Not only the extract itself, but the whole chapter, has reference to the *belligerent* right to search *neutral* vessels. Not a word here or elsewhere in Bynkershoek can be found in favor of the right of visitation and search in time of peace. Moreover, Mr. Phillimore is in error in saying that such a construction was put by Chancellor Kent upon the passage quoted. The reference is not made by Kent, but by an annotator, since his death. The text of Kent's commentaries, which remains unchanged, declares emphatically that, "it, (the right of visitation and search) is founded upon necessity, and is *strictly a war right, and does not rightfully exist in time of peace, unless conceded by treaty*." Moreover, the note to the recent editions of his work, in which Bynkershoek is erroneously quoted, refers only to intervisitation in case of suspected *piracy*, and even then it is doubtful whether anything more is intended than the *right of approach*, as described by the supreme court in the case of *Marianna Flora*, to which the note refers. Surely, Mr. Phillimore will not rest the right of visit in time of peace upon the authority of an anonymous and ambiguous note to Kent's commentaries, when the text of the same work is so emphatically against such a claim. Mr. Phillimore also refers to that part of Mr. Webster's argument drawn from the consequences resulting from the admission of the right of visitation as a *right* in time of peace, and pronounces it to be "extremely weak." Without commenting upon the judgment thus summarily passed upon the soundness of Mr. Webster's reasoning, let us examine the grounds on which Mr. Phillimore himself bases this pretended right of visitation in time of peace. All the authorities which he has quoted, have reference only to the *belligerent* right of visitation and search, which is not disputed. "But," he says, "the right of visit in *time of peace*, is a part, indeed,

but a very small part of the *belligerent* right of visit and search." In other words, the right of visit being "but a *very small part* of a *belligerent* right, it may therefore be exercised *in time of peace!* To justify the exercise, in time of peace, of *any* part of a *belligerent* right, no matter how "very small" it may be, will require something more than bare assertion; but Mr. Phillimore has given no authorities whatever in support of this new and singular proposition. It is true that he also bases this right upon the same grounds as the right to visit and detain *pirates*; but the cases, as will be shown hereafter, are so manifestly different as to destroy all analogy of reasoning. Again, he confounds the right of visit with the *right of approach*, which is admitted by Mr. Webster and all American and European writers, who most strenuously deny the *right of visit* in time of peace. "This right of mitigated visit in time of peace," he says, "is sometimes delicately described as the *right of approach*. It is called by the French, *droit d'enquête du pavillon*, as distinguished from the *droit de visite ou de recherche*; and it is said that this *nationality of the flag* may be ascertained by signals and hailing, and even when there is a suspicion of piracy, all proceedings beyond the exchange of hailing and signals, must be taken at the risk of the man-of-war who visits. Whether these limitations be just or not, it is unquestionable that the *visit* for the purpose of ascertaining the nationality of the vessel, must be exercised without the right of *search*, which is exclusively incident to a *belligerent*." Mr. Phillimore's argument in favor of the right of visit in time of peace, drawn from the requirement of international law that every vessel must have some document proving her nationality and identity, is the same as that advanced by Lord Aberdeen, and which is referred to and answered in the foregoing extracts from the official letter of Mr. Webster. (*Wheaton, Elem. Int. Law*, pt. 2, ch. 2, § 15; *Phillimore, On Int. Law*, vol. 3, §§ 322–326; *Bynkershoek, Quaest. Jur. Pub.*, lib. 1, cap. 14; *Duponceau, Translation, etc.*, p. 110; *Kent. Com. on Am. Law*, vol. 1, p. 153; *Wheaton, On the Right of Search*, pp. 153, 154; *The Marianna Flora*, 11 *Wheaton Rep.*, p. 43; *Coxe, Brief Examination, etc.*, p. 26; *Lawrence, On Visitation and Search*, pp. 79–103; *The Louis*, 2 *Dodson Rep.*, p. 210; *The San Juan Nepomuceno*, 1 *Haggard Rep.*, p. 265.)

§ 8. The remark of Mr. Phillimore, that the objection by the United States to the right to visit and search a suspected slaver bearing the American flag, applies equally to the suspected pirate sailing under the same flag, is fully answered by the American government, which admits the right to visit and search any vessel "reasonably suspected" of being engaged in piracy. The distinction is clearly pointed out in President Tyler's special message of February 27th, 1843, as follows: "The attempt to justify such a pretension [i. e. the right of visit for the purpose of suppressing the slave trade] from the right to visit and detain ships upon reasonable suspicion of piracy, would deservedly be exposed to universal condemnation; since it would be an attempt to convert an established rule of maritime law, incorporated as a principle into the international code by the consent of all nations, into a rule and principle adopted by a single nation, and enforced only by its assumed authority. To seize and detain a ship upon suspicion of piracy, with probable cause, and in good faith, affords no just ground either for complaint on the part of the nation whose flag she bears, or claim of indemnity on the part of the owner. The universal law sanctions and the common good requires the existence of such a rule. *The right under such circumstances, not only to visit and detain, but to search a ship, is a perfect right, and involves neither responsibility nor indemnity.* But, with this single exception, no nation has, in time of peace, any authority to detain the ships of another upon the high seas, on any pretext whatever, beyond the limits of the territorial jurisdiction." The argument of President Tyler, it will be seen, is founded on the admitted fact that the slave trade, not being piracy by the law of nations, cannot be held to carry with it the same liabilities attached to the latter. The pirate, as an enemy of the human race, may, by the common law of the world, be seized and disposed of by whomsoever taken. Lawful commerce demands the extinction and suppression of maritime depredation; and hence, in consideration of this desirable end, President Tyler held that "to seize and detain a ship upon suspicion of piracy, with probable cause and in good faith," affords no just ground for any reclamations in the premises. If, then, by our laws the slave trade is placed in the same category

with the crime of piracy, why should it not be subject to the same liabilities? For the reason assigned by President Tyler, in common with the consenting voice, not only of American statesmen, but of distinguished European publicists, that such an admission would involve the theoretical right of any maritime power, at its pleasure, to interpolate its municipal statutes into the law of nations. The slave trade is *not* piracy by the common law of the world, and therefore cannot be treated as piracy on the high seas, where the sanctions of international law can alone assert their right to universal recognition. The British man-of-war which detains an American vessel on suspicion of piracy is acting, according to President Tyler's view, within the scope of public law; but to assert the same right as equally applicable to the suppression of the slave trade is to found, on a municipal statute, a claim which is derivable only from the common consent of all civilized nations. It would be giving an extra-territorial effect to a municipal law, and would be a recognition of the right once assumed by Great Britain to impress her seamen from American vessels. It has been decided by the courts, both of England and America, that the slave trade is not contrary to the law of nations. (*Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 8; *Phillimore, On Int. Law*, vol. 3, §§ 322–326; *Lawrence, On Visitation and Search*, pp. 21, et seq.; *Wheaton, Elem. Int. Law*, pt. 2, ch. 2, § 15; *Pistoye et Duverdy, Traité des Prises*, tit. 1, ch. 2; *The Antelope*, 10 Wheaton Rep., p. 66; *The Diana*, 1 Dodson Rep., p. 95; *The Louis*, 2 Dodson Rep., p. 238.)

§ 9. This discussion between the governments of Great Britain and the United States, or more properly speaking, between Lord Aberdeen and Mr. Webster, arose out of the pretensions of British cruisers on the coast of Africa to visit American vessels suspected of being engaged in the slave trade. Neither party would admit the correctness of the rule of international law contended for by the other, but the difficulty in the particular case was amicably arranged by an agreement that each government should maintain a specified naval force on the coast of Africa to prevent the fraudulent use of their respective flags. The discussion, however, proved that the ground taken by the United States was sustained by



reason and the weight of authority. Such was the position of this question until 1858, when the operations of British cruisers in visiting American vessels, in the gulf of Mexico, suspected of being engaged in the slave trade, brought about a direct issue between the two governments. The United States regarded such visits as a violation of their flags, and protested against the acts of these cruisers. Before acting upon this direct issue the British ministry referred the question to the law officers of the crown, and the answer to this reference was, as predicted by Mr. Webster and Mr. Wheaton, that no authority could be found to support the pretensions of Lord Aberdeen; and the right of visit in time of peace, as distinguished from the belligerent right of visitation and search, was then distinctly and unequivocally disavowed by the British government. The Earl of Malmesbury, minister of foreign affairs, announced in the house of lords, on the 26th of July, 1858, that, on receiving the unanimous opinion of the law officers of the crown, "her majesty's government at once acted, and we frankly confessed that we had no legal claim to the right of visit and of search which has hitherto been assumed. Her majesty's government have therefore abandoned both these claims." Lord Lyndhurst, on the same occasion, in answer to the charge that the government had surrendered a most valuable and important right, said, "we have surrendered *no right at all*; for, in point of fact, *no such right as that contended for has ever existed*. We have, my lords, abandoned that *assumption* of right, and, in doing so, I think that we have acted justly, prudently, and wisely." After quoting several authorities, he continues, "your lordship will perceive that both on this side of the water, and in America, the highest authorities on the subject have pronounced against any such supposed right. For myself, I may say I have never been able to discover any principle of law or of reason upon which such a right could rest." \* \* \* Again, "I will refer now only to the principle on which the question itself rests. What is the rule in respect to the high seas, and to the navigation on the high seas? All nations are equal on the high seas. Whether they be the most powerful or the weakest, their vessels on the high seas are placed upon a perfect footing of equality. What is the

position of a merchant ship upon the high seas? Why, it is part of the dominion of the country to which it belongs. What right has one nation, then, to interfere with another when their rights on the high seas are coequal? What right has one nation to interrupt or to interfere with the navigation of another nation? Why, the principle is so clear and so distinct that it will not admit of the smallest doubt." \* \* \*

"Having stated this principle, the next question which arises is this: How are those difficulties to be met which arise out of frauds practised on the high seas? It may be said that the flag of America may be assumed by another power to cover the basest of purposes. But how can that affect the right? How can the conduct of a third power affect any right existing on the part of the United States? *By our treaty with Spain we have, no doubt, the right to visit and search Spanish vessels with the view to the suppression of the slave trade.* But how can the treaty between Spain and us affect the rights of America? Why, common reason is decisive on the subject. Well, but what other course can we take? I say that the course is quite clear and plain. If one of our cruisers see a vessel with the American flag, and has reason to believe it is assumed, he must examine and inquire into the facts as well as he can. If he ascertains, to the best of his judgment, that the vessel has no right to use the American flag, he may certainly visit and examine her papers, and if he finds his suspicions correct, he may deal with the vessel in a manner justified by the particular relation existing between England and that country to which the vessel belongs. America, in such a case, would have no right to interfere. The matter would simply be one between an English cruiser and the particular vessel seized. But, on the other hand, if it should turn out that the vessel after all was an American one, that was perfectly justified in using the flag suspected, our situation is this, that we should immediately apologize for the act that was committed, and make the most ample reparation for the injury that was committed."

The foregoing remarks of Lord Lyndhurst were adopted by the British minister of foreign affairs as expressive of the opinions of his government. (*Lawrence, On Visitation and Search*, pp. 181, et seq.; *Monthly Law Reporter*, vol. 21, p.

265; *London Times*, July 27th, 1858; *Revue des Deux Mondes*, July 1st, 1858.)

§ 10. Although it is universally conceded that the vessels of one state cannot search the duly documented vessel of another state, in time of peace, and although the right of visitation, if it exists at all, (and since its recent renouncement by Great Britain, probably no respectable power will claim that it does exist, except in cases of piracy,) must be limited, in time of peace, to the sole purpose of ascertaining the national character of a suspected vessel, it is, nevertheless, the incontestable right of the lawfully commissioned cruisers of every belligerent, *in time of war*, to visit and search, on the high seas, the merchant ships of every nation, whatever may be their character, cargoes, or destination. This right of visitation and search, in time of war, springs directly from the right of maritime capture; for without the former we must abandon the latter, or so extend it as to authorize the indiscriminate seizure of all merchant vessels that may be found upon the ocean; until they are visited and searched, it would be impossible to know whether or not they are liable to capture, either from the ownership of the vessel, the nature of the cargo, or the character of the voyage. It will be shown hereafter, that while nearly all are agreed as to the general right of visitation and search, there is great diversity of opinion with respect to the circumstances under which a neutral vessel is liable to search, and with respect to the character and extent of the search which the belligerent is authorized to make. (*Kent, Com. on Am. Law*, vol. 1, p. 153; *Duer, On Insurance*, vol. 1, p. 725; *Wildman, Int. Law*, vol. 2, p. 119; *Phillimore, On Int. Law*, vol. 3, § 325; *Wheaton, Elem. Int. Law*, pt. 4, ch. 3, § 29; *Vattel, Droit des Gens*, liv. 3, ch. 7, § 114; *Bynkershoek, Quaest. Jur. Pub.*, lib. 1, cap. 14; *Martens, Precis du Droit des Gens*, §§ 317, 321; *Galliani, dei Doveri de P. Neu.*, p. 458; *Lampredi, Del Commercio de Popoli Neu.*, p. 185; *Kcüber, Droit des Gens, Mod.*, § 293; *Hubner, Saisie des Batimens Neutres*, tome 1, pt. 2, p. 227; *Azuni, Droit Maritime*, tome 2, ch. 3, § 4; *The Antelope*, 10 Wheaton Rep., p. 66; *The Anna Maria*, 2 Wheaton Rep., p. 327; *Manning, Law of Nations*, pp. 350, et seq.; *Télens, Considerations sur les Droits, etc.*, sec. 5, p. 184; *Ortolan, Diplomatie de la Mer*, tome

2, ch. 7; *Garden, De Diplomatie*, liv. 7, § 12; *Pistoye et Duverdy, Traité des Prises*, tit. 5, ch. 1; *Bello, Derecho Internacional*, pt. 2, cap. 8, § 10; *Heffier, Droit International*, § 168; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 16; *Hautefeuille, des Nations Neutres*, tit. 11, ch. 1; *De Cussy, Droit Maritime*, liv. 1, tit. 3, § 15.)

§ 11. Sir William Scott, in the case of *The Maria*, said, that to visit and search merchant vessels on the high seas, whatever may be the ships, the cargoes, or the destinations, is the indubitable right of the lawfully commissioned cruisers of a belligerent nation, because, until they are visited and searched, it is impossible to know the character of a vessel or its destination. "This right," he says, "is so clear in principle, that no man can deny it who admits the right of maritime capture; because, if you are not at liberty to ascertain by sufficient inquiry whether there is property that can legally be captured, it is impossible to capture. \* \* \* The right is equally clear in practice, for practice is uniform and universal on the subject. The many European treaties which refer to this right, refer to it as preëxisting, and merely regulate the exercise of it. All writers upon the law of nations unanimously acknowledge it, without the exception of even Hubner himself, the great champion of neutral privileges." (*Kent, Com. on Am. Law*, vol. 1, p. 154; *Wheaton, Elem. Int. Law*, pt. 4, ch. 3, § 29; *The Maria*, 1 Rob. Rep., p. 360; *The Louis*, 2 Dod. Rep., p. 245; *Bello, Derecho Internacional*, pt. 2, cap. 8, § 10.)

§ 12. The same view of this question is taken in the United States. Chancellor Kent says, that the belligerent right of visitation and search is now "considered incontrovertible;" and after giving a summary of the opinion of the English high court of admiralty in the case of *The Maria*, he adds, the doctrine of the English admiralty "has been recognized, in its fullest extent, by the courts of justice in this country," (the United States.) The opinion of Mr. Wheaton is equally decided. "The right of visitation and search," he says, "of neutral vessels at sea, is a belligerent right, essential to the exercise of the right of capturing enemy's property, contraband of war, and vessels committing a breach of blockade.

\* \* Indeed, it seems that the practice of maritime captures could not exist without it. Accordingly the text-writers generally concur in recognizing the existence of this right." Chief Justice Marshall, in the case of *The Anna Maria*, said that "the right to visit *and detain for search* is a belligerent right which cannot be drawn into question." Notwithstanding that the ship's papers in this case were perfectly satisfactory, the supreme court held that the right to search the ship in order to examine fully as to the character of her trade, was a complete right. The same court, in other cases, have fully sustained Sir William Scott's opinion with respect to the extent of search authorized by the rules of international law. (*Kent, Com. on Am. Law*, vol. 1, p. 154; *Wheaton, Elem. Int. Law*, pt. 4, ch. 3, § 29; *Webster, Dip. and Off. Papers*, p. 164; *Webster, The Works of*, vol. 6, pp. 339, et seq.; *The Anna Maria*, 2 *Wheaton Rep.*, p. 327; *The Mariana Flora*, 11 *Wheaton Rep.*, p. 42; *The Nereide*, 9 *Cranch Rep.*, p. 427-458.)

§ 13. The continental publicists admit the general right of visitation and search, as a *belligerent* right authorized by the rules of international law, but they would restrict its exercise within very narrow limits. Hubner thinks it should be limited to the examination of the papers on board, in order to ascertain the neutrality of the vessel. Rayneval says that it should be limited to the coasts of the belligerents, and ought not to be exercised upon the high seas, any further than may be necessary to ascertain the actual neutrality of the vessel visited, because, he says, a neutral vessel on the high seas has no other duty to perform toward a belligerent than that of showing that she does not belong to the enemy, and that she is not sailing under a false flag; any further examination he deems an act of hostility. Hautefeuille considers that the right of visit may be exercised wherever acts of hostility are permitted; that is, in the territorial seas of the belligerents, and upon the ocean, but not in neutral waters. Moreover, that its object is not merely to ascertain the character of the vessel, whether it be enemy or neutral, but also, if the latter, to ascertain whether it is not violating neutral duty, and thereby rendering itself subject to capture. He,

however, limits the examination to the papers produced, and will permit no further investigation where the visiting officer doubts, or pretends to doubt, their genuineness or the truth of their statements. To search for other papers, to interrogate the captain and crew, or to investigate the character of the cargo, he deems an abuse of the right of visit,—acts entirely unauthorized, and which neutrals may and ought to resist with force. Lampredi, Azuni, and Ortolan, are of the opinion that the visit cannot proceed beyond the examination of the papers, except where there is suspicion of fraud. Martens and Massé, though in some respects differing in their views, limit the right of search to the single case where the papers are incomplete or irregular. (*Hautefeuille, Des Nations Neutres*, tit. 12; *Rayneval, De la Liberté des Mers*, tome 1, chs. 16–28; *Hubner, De la Saisie de Batimens*, tome 1, pt. 2, ch. 3; *Ortolan, Dîp. de la Mer*, liv. 3, ch. 7; *Massé, Droit Commercial*, liv. 2, tit. 2, ch. 2; *Martens, Essay sur les Armateurs*, ch. 2; *Azuni, Droit Maritime*, ch. 3, art. 4; *Lampredi, Commerce des Neutres*, § 12; *De Cussy, Droit Maritime*, liv. 1, tit. 3, § 15.)

§ 14. The exercise of this right, within its true limits, whatever they may be, implies the right of using lawful force, if necessary, in its execution, the same as in the execution of a civil process on land. The *right* of search on the one side, implies the *duty* of submission on the other; and as the belligerent may lawfully apply his force to the neutral property, for the purpose of ascertaining its character and destination, it necessarily follows that the neutral may not lawfully resist the lawful exercise of the right of search. This duty of the neutral, says Sir William Scott, is founded on the soundest maxims of justice and humanity. There are no conflicting rights between nations at peace, and the right of search in the belligerent necessarily denies the right of resistance in the neutral. Any attempt, therefore, on the part of the neutral vessel, its owner, officers, or crew, to resist the lawful search of a duly commissioned cruiser of a belligerent power, is a violation of a duty imposed by the laws of war, and incurs a penalty proportioned to the nature of the offense. (*Wheaton, Elem. Int. Law*, pt. 4, ch. 3, § 29; *Kent, Com. on Am. Law*, vol. 1, p. 154; *Ortolan, Diplomatie de la Mer*, tome 2, ch. 7;

*The Maria*, 1 Rob. Rep., p. 340; *The Eleanor*, 2 Wheat. Rep., p. 345; *Bello*, *Derecho Internacional*, pt. 2, cap. 8, § 10; *Heffter*, *Droit International*, § 171; *Riquelme*, *Derecho Pub. Int.*, lib. 1, tit. 2, cap. 14; *Hautefeuille*, *Des Nations Neutres*, tit. 11, ch. 2.)

§ 15. But, although it is the duty of the neutral to submit to the lawful search of the belligerent, and to all acts that are necessary to accomplish that object, it by no means follows that the belligerent is subject to no restraints in the exercise of this right. It is not sufficient that the right is lawful, it must be exercised in a lawful manner. The right is limited to such acts as are necessary to a thorough examination into the real character of the vessel, her cargo, and voyage, and all acts that transcend the limits of this necessity are unlawful. For any improper detention of the vessel, or any unnecessary, and therefore unlawful, violence to the master or crew, the belligerent court of admiralty is pretty certain to award full compensation in damages; and if this should be denied to the neutral, his own government may demand and enforce the redress of his wrongs. "Whatever," says Phillimore, "may be the injury that casually results to an individual from the act of another, while pursuing the reasonable exercise of an established right, it is his misfortune. The law pronounces it *damnum absque injuriâ*, and the individual from whose act it proceeds is liable neither at law, nor in the forum of conscience. The principal right necessarily carries with it, also, all the means essential to its exercise. A vessel must be pursued, in order to be detained for examination. And if, in the pursuit, she has been in any way injured, (e. g., dismasted, upset, stranded, or even run on shore and lost,) it would be an unfortunate case, but the pursuing vessel would be acquitted." The usual mode, adopted by most of the maritime powers of Europe, of summoning a neutral to undergo visitation, is the firing of a cannon on the part of the belligerent. This is called by the French *semonce*, *coup d'assurance*, and by the English, *affirming gun*. It is, undoubtedly, the duty of the neutral to obey such a summons, but there is no positive obligation on the belligerent to fire such an *affirming gun*, for its use is by no means universal. Moreover, any other method, as hailing by signals, etc., of summoning a neutral to submit to an examination, may be

equally as effective and binding as the *affirmative gun*, if the summons is actually communicated to, and understood by, the neutral. The means used are not essential, but the fact of a summons actually communicated, is necessary to acquit the visiting vessels of all damages, which may result to the neutral disobeying it. (*Ortolan, Diplomatie de la Mer*, tome 2, ch. 7; *Duer, On Insurance*, vol. 1, pp. 727, 728; *Kent, Com. on Am. Law*, vol. 1, p. 156; *Phillimore, On Int. Law*, vol. 3, §§ 331–338; *Heffter, Droit International*, § 169; *Hautefeuille, Des Nations Neutres*, tit. 11, ch. 2; *The Eleanor*, 2 Wheaton Rep., p. 358; *The Anna Maria*, 2 Wheat. Rep., p. 327; *The Jeune Eugenie*, 2 Mason Rep., p. 439; *The Mariana Flora*, 11 Wheat. Rep., pp. 48–56; *The Nereide*, 9 Cranch. Rep., p. 392; *Bello, Derecho Internacional*, pt. 2, cap. 8, § 10; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 7.)

§ 16. The penalty for the violent contravention of this right, is the confiscation of the property so withheld from visitation and search. “For the proof of this,” says Sir Wm. Scott, “I need only refer to Vattel, one of the most correct, and certainly not the least indulgent of modern professors of public law.” He then quotes § 114, ch. 7, liv. 3, of Vattel, *Droit des Gens*, and continues: “Vattel is here to be considered not as a lawyer delivering an opinion, but as a witness asserting a fact—the fact that such is the existing practice of modern Europe.” After referring to other authorities, he closes his remarks on this point with the following emphatic declaration: “I stand with confidence upon all principles of reason—upon the distinct authority of Vattel, —upon the institutes of other great maritime countries, as well as those of our own country, when I venture to lay it down, that by the law of nations, as now understood, a deliberate and continued resistance to search, on the part of a neutral vessel, to a lawful cruiser, is followed by the legal consequence of confiscation.” This penalty is not averted by the orders of the neutral sovereign to resist the visitation and search of the belligerent cruiser. “The law of nations,” says Duer, “does not permit the sovereign power of a neutral state to interpose its authority for such a purpose, so as to vary the legal rights of the belligerent. \* \* \* Hence, the obedience of the neutral subject to the unlawful orders of



his government, so far from justifying his conduct, will impress him with the character of an enemy." The resistance of the neutral cannot, therefore, be protected by any orders or instructions from its own government, but the act must be judged of according to its own character. (*Wildman, Int. Law*, vol. 2, pp. 122, et seq.; *Duer, On Insurance*, vol. 1, pp. 728, 729; *The Maria*, 1 Rob. Rep., p. 361; *The Elzabe*, 4 Rob. Rep., p. 408; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 14; *Ortolan, Diplomatie de la Mer*, tome 2, ch. 7.)

§ 17. Nor, according to the opinion of Sir Wm. Scott, can the interposition of the authority of the neutral sovereign, by the presence of an armed convoy, deprive the lawfully commissioned cruiser of the legal right of visitation and search. His language on this point is very clear and decided. "Two sovereigns," he says, "may unquestionably agree, if they think fit, as in some late instances they have agreed, by special covenant, that in the presence of one of their armed ships along with their merchant ships, shall be mutually understood to imply that nothing is to be found in that convoy of merchant ships inconsistent with amity or neutrality; and if they consent to accept this pledge, no third party has a right to quarrel with it, any more than any pledge which they may agree mutually to accept. But surely no sovereign can legally compel the acceptance of such a security by mere force. The only security known to the law of nations upon this subject, independently of all special covenant, is the right of personal visitation and search, to be exercised by those who have the interest in making it." (*Wheaton, Elem. Int. Law*, pt. 4, ch. 3, § 29; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 14; *Hautefeuille, Des Nations Neutres*, tit. 11, ch. 3; *De Cussy, Droit Maritime*, liv. 2, ch. 22; *Bello, Derecho Internacional*, pt. 2, cap. 8, § 10; *Duer, On Insurance*, vol. 1, p. 729; *Manning, Law of Nations*, p. 369; *Phillimore, On Int. Law*, vol. 3, § 838; *Wildman, Int. Law*, vol. 2, p. 124; *The Maria*, 1 Rob. Rep., p. 340.)

§ 18. This question leads to an examination of the powers, duties, and exemptions of public armed vessels on the high seas. The belligerent right of visitation and search, whatever its extent or limitation, is undoubtedly confined exclusively to private merchant vessels, and does not apply to ships

of war. The immunity of such vessels on the high seas, from the exercise of any right of visitation and search, or of any other belligerent right, has been uniformly asserted and conceded. "A contrary doctrine," says Kent, "is not to be found in any jurist or writer on the law of nations, or admitted in any treaty, and every act to the contrary has been promptly met and condemned." "A public vessel," says Wheaton, "belonging to an independent sovereign, is exempt from every species of visitation and search, even within the territorial jurisdiction of another state; *à fortiori*, must it be exempt from the exercise of belligerent rights on the ocean, which belong exclusively to no one nation." (*Kent, Com. on Am. Law*, vol. 1, p. 157; *Wheaton, Elem. Int. Law*, pt. 4, ch. 3, § 18; *Vattel, Droit des Gens*, liv. 1, ch. 19, § 216; liv. 2, ch. 7, § 80; *Grotius, de Jur. Bel. ac Pac.*, lib. 2, cap. 8, § 18; *Rutherford, Institute*, b. 2, ch. 9, §§ 8, 19; *Phillimore, On Int. Law*, vol. 3, § 334; *Manning, Law of Nations*, pp. 370, et seq.; *Ortolan, Diplomatie de la Mer*, tome 2, ch. 7; *Bello, Derecho Internacional*, pt. 2, cap. 8, § 10; *Hautefeuille, Des Nations Neutres*, tit. 11, ch. 5.)

§ 19. One of the most common, as well as one of the most important duties of public ships of war, is the *convoy* or protection of merchant vessels on the high seas. Can such convoying ships exempt the merchant vessels, under their protection, from the exercise of the right of visitation and search, from which they themselves are exempt? If so, may neutral vessels place themselves under such protection, and lawfully resist any attempt on the part of belligerent cruisers, to subject them to such visitation and search? In other words, is the opinion of Sir William Scott, before referred to, a true exposition of the law of nations on this subject? If private merchant vessels, so convoyed, are exempt from visitation and search, there can be no doubt that no resistance on their part to an attempt to visit or search them, can draw after it any penalty; for in doing so, they violate no duty. This question is properly divided into two parts: First, the case of convoy, by ships of war, of private vessels of the same state; and second, the case of convoy of merchant vessels of other neutral states. The discussions of publicists has been mainly confined to the first class of cases, although some have

claimed that the convoying ship extends its own exemption to all neutral merchant vessels under its protection. Before examining into this distinction, we will give a brief summary of the various treaties on the subject of convoy, and the opinions of text-writers. (*Hautefeuille, Des Nations Neutres*, tit. 11, ch. 8; *Ortolan, Diplomatie de la Mer*, liv. 3, ch. 7; *Massé, Droit Commercial*, liv. 2, ch. 2; *Heffter, Droit International*, § 170; *Jouffroy, Droit Maritime*, p. 2; *Nau, Völkerrecht*, §§ 169, et seq.; *Jacobsen, Seerecht, etc.*, p. 140; *Manning, Law of Nations*, p. 355; *De Cussy, Droit Maritime*, liv. 2, ch. 22; *Poehls, Seerecht*, p. 532.)

§ 20. Whatever may have been the ancient practice with respect to the effect of neutral convoy on the exercise of the belligerent right of visitation and search, it was not till near the middle of the seventeenth century that the question assumed any considerable importance. In the war of 1658, between England and Holland, Queen Christina, of Sweden, directed her merchant vessels to take all possible advantage of the convoy of her ships of war, and ordered such convoying ships to resist, even by force, every attempt on the part of the belligerents to visit the merchant vessels placed under their protection. This ordinance, however, was never executed, and the war was terminated soon after its publication. In the succeeding war, between England and Spain, Holland, now a neutral, claimed the exemption of her merchant ships under convoy, and an English squadron was obliged to content itself with the word of De Ruyter, that the vessel under his convoy carried nothing belonging to the king of Spain. England, however, refused to acknowledge any such right of exemption, and Holland herself, whenever a belligerent, always attempted to visit merchant vessels, under neutral convoy. Even when a neutral, she admitted the duty of the convoying ships to exhibit the papers of the merchant vessel under its escort, and, if found to be irregular, the right of the belligerent cruiser to visit the suspected vessel, and even to seize and conduct it into port for trial. Nevertheless, she applauded the conduct of Captain Deval, in 1762, and of Admiral De Byland, in 1780, in forcibly resisting the attempt of English men-of-war to visit merchant vessels under their convoy. None of the treaties of 1780, alluded to this ques-

tion, but the resistance of the Swedish vessel-of-war, *The Wasa*, in 1781, of an attempt of an English cruiser to visit a merchant vessel under convoy, revived the discussion, and the right of exemption was stipulated in a number of treaties, made soon after by Russia and Sweden, with other powers, and especially in the convention of armed neutrality, signed December 4–16th, 1800. But in the convention of June 17th, 1801, Russia herself conceded the belligerent right of ships of war to visit merchant vessels under neutral convoy. This convention was annulled in 1807. Since the peace of 1815, European treaties have generally, except where England was a party, stipulated for the exemption of merchant vessels, under the convoy of public ships of the same state. The treaties which the United States have made with foreign powers, both before and since that period, have generally provided that in case of convoy, the declaration of the commander of the convoy, that the vessels under his protection belong to the nation whose flag he carries, and when bound to an enemy's port, that they have no contraband goods on board, shall be sufficient. Such are the stipulations contained in the treaty with Sweden, of April 3d, 1788, with France, of September 30th, 1800; with Columbia, made October 3d, 1824; with Brazil, made December 12th, 1828; with Mexico, made April 5th, 1831; with Chile, made May 16th, 1832; with Peru-Bolivia, made November 13th, 1836; with Venezuela, made January 20th, 1836, etc. It is worthy of remark, that the orders and decrees of the belligerents in the Crimean war, were silent as to convoy; nor was it alluded to in the declaration of the Paris conference, April 16th, 1856. (*Hautefeuille, Des Nations Neutres*, liv. 1, tit. 2, ch. 14; *Heffter, Droit International*, § 170; *Wheaton, Elem. Int. Law*, pt. 4, ch. 3, § 29; *U. S. Statutes at Large*, vol. 8, pp. 188, 316, 395, 420, 438, 478, 493.)

§ 21. Recent continental publicists, have generally contended that neutral convoy exempts the convoyed vessel from visitation and search. Some have stated this proposition in general terms, while others limit it to merchant vessels convoyed by ships of war of their own nation, and put it on the ground that the declaration of the commander is sufficient as to the character and cargoes of the vessels of his own

country under his escort and protection. Such are the general views of Martens, Rayneval, Klüber, Heffter, Massé, and Ortolan. Rayneval, however, is of the opinion that if the belligerent vessel should inform the convoying commander that he has evidence that one or more of the vessels under his escort are liable to capture for being really enemy's vessels, or because they have on board contraband goods, destined to an enemy's port, the commander should immediately proceed, in concert with the belligerent cruiser, to verify the truth of these allegations. This opinion is concurred in by Ortolan; but Hautefeuille thinks that such examination, if made, should be by the neutral officer only, and that his word, as to the character of his convoy, must suffice. This author has discussed the question of convoy at great length, and with marked ability. It must, however, be remembered, that he attempts to represent what *ought to be* the rule of international law on this subject, rather than what that law *really is* at the present time. English text-writers have adopted the opinion of Sir William Scott, with respect to the *right* to visit and search vessels under neutral convoy, and the effect of such convoy, when it tended to impede and defeat this belligerent right. Manning denies that neutrals, under convoy, can claim, under the general law of nations, to be exempted from search, as a matter of right, but he deems it desirable that it should be accorded to them by agreement. The United States have uniformly favored the rule of exemption, and have, whenever possible, introduced it into their treaties with other powers. It must, however, be stated that American publicists have generally admitted that the exemption cannot be claimed as a matter of law, and that an attempt in this way to impede search will incur a penalty. Chancellor Kent says, that "the very act of sailing under the protection of a belligerent or *neutral* convoy, *for the purpose of resisting search*, is a violation of neutrality." Mr. Wheaton, in his discussion of the Danish captures under the ordinance of 1810, referring to the English decisions respecting neutral convoys, says: "Why was it that navigating under the convoy of a *neutral* ship of war was deemed a conclusive cause of condemnation? It was because it tended to impede and defeat the belligerent right of search; to render every attempt

to exercise this lawful right a contest of violence; to disturb the peace of the world, and to withdraw from the proper forum the determination of such controversies by forcibly preventing the exercise of its jurisdiction." Mr. Justice Story, in the case of *The Nereide*, says: "It is a clear maxim of national law that a neutral is bound to a perfect impartiality as to all the belligerents. If he incorporate himself into the measures or policy of either; if he become auxiliary to the enterprises or acts of either, he forfeits his neutral character,—nor is this all. In relation to his commerce he is bound to submit to the belligerent right of search, and he cannot lawfully adopt any measures whose direct object is to withdraw that commerce from the most liberal and accurate search, without the application, on the part of the belligerent, of superior force. If he resists this exercise of lawful right, or if, with the view to resist it, he takes the protection of an armed neutral convoy, he is treated as an enemy, and his property is confiscated. Nor is it at all material whether the resistance be direct or constructive. The resistance of the convoy is the resistance of all the ships associated under the common protection, without any distinction whether the convoy belong to the same or a foreign neutral sovereign; for upon the principles of natural justice, a neutral is justly chargeable with the acts of the party, which he voluntarily adopts, or, of which he seeks the shelter and protection." (*Wildman, Int. Law*, vol. 2, p. 124; *Kent, Com. on Am. Law*, vol. 1, p. 157; *Wheaton, Elem. Int. Law*, pt. 4, ch. 3, § 32; *Duer, On Insurance*, vol. 1, pp. 731, 732; *The Nereide*, 9 Cranch. Rep., p. 438; *The Catharine Elizabeth*, 5 Rob. Rep., p. 232; *Rayneval, De la Liberté des Mers*, t. 1, ch. 18; *Klüber, Droit Des Gens Mod.*, § 293; *Massé, Droit Commercial*, liv. 2, ch. 2, sec. 9; *Ortolan, Diplomatie de la Mer*, liv. 3, ch. 7; *Heffter, Droit International*, § 170; *Hautefeuille, Des Nations Neutres*, tit. 11, ch. 3; *De Cussy, Droit Maritime*, liv. 1, tit. 3, § 15.)

§ 22. The question, whether neutral vessels under enemy's convoy are liable to capture and condemnation, has been frequently raised and most elaborately discussed. The lords of appeal in England, decided in the case of *The Sampson*, that sailing under enemy's convoy was a *conclusive* ground of condemnation. There has been no direct decision on this subject

by the supreme court of the United States. The question was not directly involved in the case of *The Nereide*, but Justice Story in his dissenting opinion said: "My judgment is, that the act of sailing under belligerent convoy is a violation of neutrality, and the ship and cargo, if caught *in delicto*, are justly confiscable; and further, that if resistance is necessary, as in my opinion it is not, to perfect the offence, still the resistance of the convoy is to all purposes, the resistance of the association." Chancellor Kent is clear, that "the very act of sailing under the protection of a belligerent convoy, *for the purpose of resisting search*, is a violation of neutrality." Duer, in his able work on Insurance, fully coincides in this opinion. Wheaton limits himself to a statement of his own arguments, as the advocate of the claims of American merchants against Denmark for condemnation, under the ordinance of 1810, for having made use of English convoy. The strongest point of his argument is, that being found in company with an enemy's convoy, even if *presumptive* evidence, certainly should not be regarded as *conclusive* of an intention to resist the search of a duly commissioned belligerent cruiser. "This presumption," he says, "is not of that class of presumptions called *presumptiones juris et de jure*, which are held to be conclusive upon the party, and which he is not at liberty to controvert. It is a slight presumption only, which will yield to countervailing proof. One of the proofs which, in the opinion of the American negociator, ought to have been admitted by the prize tribunal to countervail this presumption, would have been evidence that the vessel had been compelled to join the convoy; or that she had joined it, not to protect herself from examination by Danish cruisers, but against others, whose notorious conduct and avowed principles render it certain, that capture by them would inevitably be followed by condemnation. It followed, then, that the simple fact of having navigated under British convoy could be considered as a ground of suspicion only, warranting the captors in sending in the captured vessel for further examination, but not constituting in itself a conclusive ground of confiscation." This argument of Mr. Wheaton, was ably answered by the Danish authorities, who held that "the only point so be established is, whether the neutral was *voluntarily*

under enemy's convoy." If so, condemnation must inevitably follow. The negotiation finally terminated in a treaty to pay the American claimants, *generally*, a fixed sum, *en bloc*; but without any admission by either party of the correctness of the other's views on this question of international law. The English commentators on this discussion regard the Danish ordinance as in perfect conformity with the law of nations. Hautefeuille states the arguments of both parties without expressing his own opinion. Ortolan admits that the act of a neutral navigating under a convoy of a belligerent may be irregular and even illegal, and that such a convoy cannot always exempt from search. "Mais," he says, "Si le neutre se joint en pleine mer à un ou à plusieurs navires de guerre belligérants et navigue de conserve avec ces navires sans prétendre à aucune protection de leur part, dans la seule espérance de pouvoir échapper pacifiquement et par la suite à la visite, à la faveur d'une rencontre et d'un combat possible entre les seuls belligérants, c'est là de sa part une ruse innocente que ne peut lui être imputée à délit, et qui ne peut pas, à elle seule, entraîner la confiscation." Perhaps the foregoing remarks of Ortolan are too strongly expressed, for, in the very case he describes, the neutral merchant vessel uses the force of the belligerent convoy to escape search. It is not only a constructive but a virtual resistance. The case, however, is very different where the merchant vessel has left the convoy prior to the appearance of, or attempted search by the belligerent cruiser; as, for example, where the convoy was used on the outward voyage, and the capture made during the return voyage. This distinction is forcibly presented by Mr. Wheaton, in his argument in favor of the American claimants for indemnity for Danish captures under the ordinance of 1810. We know of no judicial decision directly upon this question. (*Duer, On Insurance*, vol. 1, p. 780; *Ortolan, Diplomatie de la Mer*, tome 2, ch. 7; *Wheaton, Elem. Int. Law*, pt. 4, ch. 3, § 82; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 14; *Martens, Nouveau Recueil*, tome 8, p. 850; *Elliot, American Diplomatic Code*, vol. 1, p. 453; *Wildman, Int. Law*, vol. 2, p. 126; *The Nereide*, 9 Cranch. Rep., p. 442; *Phillimore, On Int. Law*, vol. 3, § 388; *Manning, Law of Nations*, p. 369.)



§ 23. "The resistance of a neutral master," says Sir Wm. Scott, in the *Catharina Elizabeth*, before quoted, "will undoubtedly reach the property of the owner; and it would, I think, extend also to the whole property intrusted to his care, and thus fraudulently attempted to be withdrawn from the operation of the rights of war." "Confiscation," says Chancellor Kent, "is applied, by way of penalty, for resistance to search, to all vessels without any discrimination as to the national character of the vessel or cargo, and without separating the fate of the cargo from that of the ship." Mr. Duer holds that a forcible resistance to a lawful search is a distinct and substantial course of condemnation, and involves all the property under the charge of the neutral master; not merely that of his owners, but of the shippers, although between them and himself no relation of principal and agent can be said to exist. "The goods may be wholly innocent, in their nature, and from their destination, and their true character, and that of the ship, as neutral may be undoubted, but the unlawful resistance, from the time it is attempted, stamps on them all an illegal character, and involves them all in its fatal penalty." The offence being regarded as of a greater criminality and more dangerous in its effects than the transportation of contraband or the violation of a blockade, the severity of the penalty is the greater. The forcible resistance of an *enemy* master will not, in general, affect neutral property laden on board an enemy's *merchant vessel*; for an attempt on his part to rescue his vessel from the possession of the captor, is nothing more than the hostile act of a hostile person, who has a perfect right to make such an attempt. "If a *neutral* master," says Sir William Scott, "attempts a rescue, or to withdraw himself from search, he violates a *duty* which is imposed on him by the law of nations, to submit to search, and to come in for inquiry as to the property of the ship or cargo; and if he violates this obligation by a recurrence to force, the consequence will undoubtedly reach the property of his owner, and it would, I think, extend also to the whole property intrusted to his care, and thus fraudulently attempted to be withdrawn from the operation of the right of war. With an *enemy* master, the case is very different; no duty is violated by such an act on his part—

*lupum auribus teneo*, and if he can withdraw himself he has a right to do so." (*Duer, On Insurance*, vol. 1, p. 733; *Philimore, On Int. Law*, vol. 3, § 339; *Wheaton, Elem. Int. Law*, pt. 4, ch. 3, § 30; *The Catharina Elizabeth*, 5 Rob. Rep., p. 232; *Wildman, Int. Law*, vol. 2, p. 222.)

§ 24. The supreme court of the United States have applied the same rule to *neutral* property in an *armed enemy* vessel, and in the case of *The Nereide*, decided in 1815, it was held that a neutral had a right to charter and lade his goods on board a belligerent armed merchant ship without forfeiting his neutral character, unless he actually concurred and participated in the enemy master's resistance to capture. This doctrine was re-affirmed in 1818, in the case of *The Atalanta*, notwithstanding the contrary opinion of Sir Wm. Scott in the case of *The Fanny*, decided contemporaneously with that of *The Nereide*; it may therefore be regarded as the settled opinion of our highest court on this question of international law. The reasoning of the supreme court most ably sustains its decision, notwithstanding the powerful arguments in the dissenting opinion of Mr. Justice Story, supported as it is by the opinions of Kent and Duer, among American writers, and by the decision of Sir Wm. Scott in the case of *The Fanny* and the authority of English publicists generally. The question does not seem to have arisen in the continental courts. Hautefeuille sustains, on principle, the American decision against that of Sir Wm. Scott, while Ortolan merely states the contradiction between the English and American decisions on this question, without expressing any opinion of his own upon the particular question involved. (*Duer, On Insurance*, vol. 1, pp. 730, 731; *Kent, Com. on Am. Law*, vol. 1, pp. 132, 133; *The Nereide*, 9 Cranch. Rep., p. 388; *The Fanny*, 1 Dod. Ad. Rep., p. 443; *The Atalanta*, 3 Wheaton Rep., p. 409; *Wildman, Int. Law*, vol. 2, p. 126; *Wheaton, Elem. Int. Law*, pt. 4, ch. 3, § 313; *Hautefeuille, Des Nations Neutres*, tit. 11, ch. 420; *Ortolan, Diplomatie de la Mer*, tome 3, ch. 7; *Philimore, On Int. Law*, vol. 3, § 341.)

§ 25. The acknowledged belligerent right of visitation and search draws after it a right to the production and examination of the ship's papers. With respect, however, to the

nature and character of the papers which the neutral is bound to have on board, there is some difference of opinion. Some continental writers contend that the ordinary sea letter or passport, is all that is required, as that must establish the nationality of the vessel. If, however, it has been agreed between the belligerent and neutral, that certain papers executed in a particular form shall be carried, the absence of such papers, so executed, may be good ground of seizure. But English and American writers, as well as the decisions of the prize courts of the two countries, have held, that the neutral vessel may be required to have on board, and to produce when visited, such other documentary evidence as is usually carried, and deemed necessary to establish the character of the ship and its cargo; and that the absence or non-production of such papers, may, or may not, be good cause for capture, and condemnation, according to the particular circumstances of the case. The rule is very clearly stated by Chancellor Kent. "A neutral is bound," he says, "not only to submit to search, but to have his vessel duly furnished with the genuine documents requisite to support her neutral character. The most material of these documents are, the register, passport or sea-letter, muster-roll, log-book, charter-party, invoice, and bill of lading. 'The want of some of these papers is strong presumptive evidence against the ship's neutrality, yet the want of any one of them is not absolutely conclusive. *Si aliquid ex solemnibus deficiat, cum equitas pascit subveniendum est.*" (Kent, *Com. on Am. Law*, vol. 1, p. 157; Duer, *On Insurance*, vol. 1, pp. 734, 735; *The Two Brothers*, 1 Rob. Rep., p. 131; *The Rising Sun*, 2 Rob. Rep., p. 104; *Pizarro*, 2 Wheaton Rep., p. 241; *The Ann Green*, 1 Gallis. Rep., p. 281; *Bello, Derecho Internacional*, pt. 2, cap. 8, § 11; *Hautefeuille, Des Nations Neutres*, tit. 12, ch. 1; *Martens, Essai sur les Armateurs*, ch. 2, § 22; *Massé, Droit Commercial*, liv. 2, tit. 1, ch. 2; *Pistoye et Duverdy, Des Prises*, tit. 6, ch. 2, sec. 4; *De Cussy, Droit Maritime*, liv. 1, tit. 3, § 15.)

§ 26. Sometimes the neutral vessel produces the principal papers necessary to show her neutrality and the innocent character of her cargo, but conceals others which might have a contrary effect, as, for example, secret instructions relating to her destination and the landing of goods, etc. Those who

deny the right of search beyond the verification of her sea-letter, or manifest, justify such concealment. But English and American writers are of opinion, that concealment is in itself a serious offense against the belligerent right of visit and search. The rule of international law on this question is thus stated by Chancellor Kent: "The concealment of papers," he says, "material for the preservation of the neutral character, justifies a capture, and carrying into a port for adjudication, though it does not absolutely require a condemnation. It is good ground to refuse costs and damages on restitution, or to refuse further proof to relieve the obscurity of the case, where the cause labored under heavy doubts, and there was *prima facie* ground for condemnation independent of the concealment." (*Kent, Com. on Am. Law*, vol. 1, p. 161; *Duer, On Insurance*, vol. 1, p. 735; *The Two Brothers*, 1 Rob. Rep., p. 131; *The Rising Sun*, 2 Rob. Rep., p. 104; *The Polly*, 2 Rob. Rep., p. 362; *Bello, Derecho Internacional*, pt. 2, cap. 8, §§ 10, 11; *Hautefeuille, Des Nations Neutres*, tit. 12, ch. 1; *Pistoje et Duverdy, Des Prises*, tit. 6, ch. 2, sec. 4.)

§ 27. The spoliation of the papers of a ship, subjected to the visitation and search of a belligerent cruiser, is a still more aggravated circumstance of suspicion than that of their denial or concealment, and, in most countries, would be sufficient to infer guilt and exclude further proof. "But it does not in England," says Kent, "as it does by the maritime law of other countries, create an absolute presumption *juris et de jure*; and yet, a case that escapes with such a brand upon it, is saved so as by fire. The supreme court of the United States has followed the less rigorous English rule, and held that the spoliation of papers was not, of itself, sufficient ground for condemnation, and that it was a circumstance open for explanation, for it may have arisen from accident, necessity, or superior force. If the explanation be not prompt and frank, or be weak and futile; if the cause labors under heavy suspicions, or there be a vehement presumption of bad faith, or gross prevarication, it is good cause for the denial of further proof; and the condemnation ensues from defects in the evidence, which the party is not permitted to supply. The observation of Lord Mansfield, in *Bernardi*

*v. Motteaux*, was to the same effect. By the maritime law of all countries, he said, throwing papers overboard was considered as a strong presumption of enemy's property; but, in all his experience, he had never known a condemnation on that circumstance only." (*Kent, Com. on Am. Law*, vol. 1, p. 158; *Duer, On Insurance*, vol. 1, p. 738; *Bernardi v. Motteaux*, Doug. Rep., p. 581; *Livingston v. Gilchrist*, 7 Cranch. Rep., p. 544; *The Hunter*, 1 Dodson Rep., p. 480; *The Pizarro*, 2 Wheaton Rep., p. 227; *The Rising Sun*, 2 Rob. Rep., p. 108; *Bello, Derecho Internacional*, pt. 2, cap. 8, § 11; *Pistoye et Duverdy, Des Prises*, tit. 6, ch. 2, sec. 5; *De Cussy, Droit Maritime*, liv. 1, tit. 3, § 15.)

§ 28. "The use of false papers," says Mr. Duer, "although in all cases morally wrong, is not in all cases a subject of legal animadversion in a court of prize. Such a court has no right to consider the use of the papers as criminal, where the sole object is to evade the municipal regulations of a foreign country, or to avoid a capture by the opposite belligerent. The falsity is only noxious where it certainly appears, or is reasonably presumed, that the papers were framed with an express view to deceive the belligerent by whom the capture is made, so that, if admitted as genuine, they would operate as a fraud on the rights of the captors. It is not sufficient, that the papers disclose the most disgusting preparations of fraud in relation to a different voyage or transaction. The fraud must certainly, or probably, relate to the voyage or transaction which is the immediate subject of investigation." (*Duer, On Insurance*, vol. 1, p. 738; *The Eliza and Katy*, 6 Rob. Rep., p. 192; *The Juffrow Anna*, 1 Rob. Rep., p. 124; *The Ann Green*, 1 Gallison Rep., p. 275; *The Sally*, 1 Gallis. Rep., p. 401; *The Alexander*, 1 Gallis. Rep., p. 536; *The Betsey*, 2 Gallis. Rep., p. 384; *The Fortuna*, 3 Wheaton Rep., p. 245; *The St. Nicholas*, 1 Wheaton Rep., p. 417; *Blaze v. N. Y. Ins. Co.*, 1 Caines Rep., p. 565; *Phoenix Ins. Co. v. Pratt*, 2 Binney Rep., p. 308; *The Vrouw Hermina*, 1 Rob. Rep., p. 163; *The Calypso*, 2 Rob. Rep., p. 154; *The Carolina*, 3 Rob. Rep., p. 75; *The Rosalie and Betty*, 2 Rob. Rep., p. 343; *The Nancy*, 3 Rob. Rep., p. 122; *The Jonge Tobias*, 1 Rob. Rep., p. 329; *The Convenientia*, 4 Rob. Rep., p. 201; *The Johanna Thalen*, 6 Rob. Rep., p. 72; *The*

*Mars*, 6 Rob. Rep., p. 79; *The Phoenix*, 3 Rob. Rep., p. 186; *The Enrom*, 2 Rob. Rep., p. 9; *The Graaff Bernstorff*, 3 Rob. Rep., p. 109; *The Zulema*, 1 Act. Rep., p. 14.)

§ 29. In the wars immediately resulting from the French revolution, the British government attempted to engraft upon the right of visitation and search the right of impressment of seamen by British cruisers from American merchant vessels. The deep feeling of opposition, in the United States, to this pretended right, as claimed by England, and to the practice exercised under it, coöperated most powerfully with other causes to produce the war of 1812 between the two countries. The war was terminated by the treaty of Ghent, on the basis of the *status quo ante bellum*, leaving the questions of maritime law which led to the war still unsettled. It is not probable, however, after the discussions which have taken place on this subject, that the British government will ever again attempt to enforce this alleged right of impressment; at any rate, not from American merchant vessels. The British government seems to regard the right of impressment from neutral merchant vessels as incident to, rather than as a part of, the right of search. It is alleged that, by the English law, the subject owes a perpetual and indissoluble allegiance to the crown, and is under the obligation, in all circumstances, and for his whole life, to render military service to the crown, whenever required; and that it is a legal exercise of the prerogative of the crown to enforce this obligation of the subjects, wherever they may be found. That, the right of search being conceded by the laws of war, it gives the right of examining the crews of neutral vessels, and if, on such examination, British seamen be found among them, such seamen may be forcibly taken from the neutral vessels, and carried on board British cruisers. In reply, the American government says that, whatever may be the obligations existing between the crown of England and its subjects, the English law cannot be enforced beyond the dominions and jurisdiction of that government; that, every merchant vessel on the high seas being rightfully considered as a part of the territory of the country to which it belongs, to attempt to enforce the peculiar law of England on board such vessel, is to assert and exercise an extra territorial authority for the law of British prerogative. "If this notion

of perpetual allegiance," says Mr. Webster, "and the consequent power of the prerogative, was the law of the world; if it formed part of the conventional code of nations, and was usually practised, like the right of visiting neutral vessels for the purpose of discovering and seizing enemy property, then impressment might be defended as a common right, and there would be no remedy for the evil, till the national code should be altered. But this is by no means the case. There is no such principle incorporated into the code of nations. The doctrine stands only as English law, not as national law; and English law cannot be of force beyond English dominion. Whatever duties and relations that law creates between the sovereign and his subjects, can be enforced and maintained only within the realm, or proper possessions, or territory of the sovereign. There may be quite as just a prerogative right to the property of subjects as to their personal services, in an exigency of the state; but no government thinks of controlling, by its own laws, property of its subjects situated abroad; much less does any government think of entering the territory of another power, for the purpose of seizing such property, and applying it to its own uses. As laws, the prerogatives of the crown of England have no obligations on persons or property domiciled or situated abroad." (*Webster's Works*, vol. 5, p. 142; vol. 6, p. 829; *Webster, Dip. and Off. Papers*, p. 97; *Wheaton, Hist. Law of Nations*, pp. 789, 740; *Phillimore, On Int. Law*, vol. 3, § 835; *Manning, Law of Nations*, p. 371.)

§ 30. After a calm and dispassionate examination of the whole subject, the American secretary of state announces the rule which will be maintained by his government. "The American government," says Mr. Webster, "is prepared to say that the practice of impressing seamen from American vessels, cannot hereafter be allowed to take place. That practice is founded on principles which it does not recognize, and is invariably attended by consequences so unjust, so injurious, and of such formidable magnitude, as cannot be submitted to. In the early disputes between the two governments on this so long contested topic, the distinguished person to whose hands were first committed the seals of this department, declared, that the simplest rule will be, that the

vessel being American, shall be evidence that the seamen on board are such! Fifty years experience, the utter failure of many negotiations, and a careful reconsideration, now had, of the whole subject, at a moment when the passions are laid, and no present interest or emergency exists to bias the judgment, have fully convinced this government that this is not only the simplest and best, but the only rule, which can be adopted and observed consistently with the rights and honor of the United States, and the security of their citizens. That rule announces, therefore, what will hereafter be the principle maintained by their government. *In every regularly documented American merchant vessel, the crew who navigate it will find their protection in the flag which is over them.*" (Webster, to Lord Ashburton, Aug. 8, 1842; Webster, *Dip. and Off. Papers*, p. 101; Wheaton, *Hist. Law of Nations*, pp. 745, 746; Webster, *The Works of*, vol. 6, p. 325.)



## CHAPTER XXVI.

## VIOLATION OF NEUTRAL DUTIES.

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§ 1. Any act of positive hostility on the part of a neutral state toward one of the belligerents in a war, is deemed a breach of neutrality, and makes such state a party in the war. The rights and duties of neutrality are correlative, and the former cannot be claimed, unless the latter are faithfully performed. If the neutral state fail to fulfil the obligations of neutrality, it cannot claim the privileges and exemptions inci-

dent to that condition. The rule is equally applicable to the citizens and subjects of a neutral state. So long as they faithfully perform the duties of neutrality, they are entitled to the rights and immunities of that condition. But for every violation of neutral duties, they are liable to the punishment of being treated in their persons or property as public enemies of the offended belligerent. (*Kent, Com. on Am. Law*, vol. 1, pp. 115–117; *Wheaton, Elem. Int. Law*, pt. 4, ch. 8, § 1; *Vattel, Droit des Gens*, liv. 3, ch. 7, § 104; *Bello, Derecho Internacional*, pt. 2, cap. 7; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 11; *De Cussy, Droit Maritime*, liv. 1, tit. 8, § 9.)

§ 2. Having already discussed the mutual duties of states, in times of peace, it will not be necessary here to make any extended argument to enforce those duties on the part of the neutral state toward other states with which it remains at peace, while they are carrying on hostilities toward each other. Its duty is that of entire impartiality, as well as neutrality. "Should a neutral government, without cause or provocation, complaint or warning, attack the possessions, or capture the ships of a belligerent power, all would denounce the aggression as a flagrant outrage on the laws of justice as well as of humanity; yet it is precisely this violation of justice, although in a milder form, that a neutral government is guilty, that, while it affects to maintain the relations of friendship with contending belligerent powers, furnishes to one effectual aid in the prosecution of the war, by a supply of ships, or arms, or munitions of war. With whatever pretext the government may veil its conduct, its acts are those of unprovoked and causeless, and, therefore, unjust hostility." A violation of neutrality is not limited to acts of positive hostility. If the neutral state assist one of the belligerents; if it grant favors to one to the detriment of the others; if it neglect or refuse to maintain the inviolability of its territory; or if it fail to restrain its own citizens and subjects from overstepping the just bounds of neutrality, as defined and established by the law of nations,—it violates its duties toward the belligerent who is injured by such act or neglect, and is justly chargeable with hostility. Such conduct furnishes good cause for complaint, and, if persisted in, may become just cause of war. Sir Wm. Scott very justly remarked that

there are no conflicting rights between nations at peace; which remark may be applied, with truth, to every case of a violation of neutral duty. (*Bello, Derecho Internacional*, pt. 2, cap. 7, §§ 1-3; *Duer, On Insurance*, vol. 1, pp. 531, 754; *Harrat v. Wise*, 9 Barn. and Cress. Rep., p. 712; *Naylor v. Taylor*, 9 Barn. and Cress. Rep., p. 715; *Medeiros v. Hill*, 8 Bing. Rep., p. 231; *The Maria*, 1 Rob. Rep., pp. 360, 361; *Püklin, Civil and Pol. Hist. of U. S.*, vol. 1, ch. 10.)

§ 3. But while the law of nations holds the government of the neutral state responsible for any act of positive hostility committed by its officers, or, in most cases, by its citizens and subjects, it is not in general held responsible for ordinary violations of neutral duty, (not in themselves of positive hostility,) by such citizens or subjects. The law in such cases imposes the duty upon the individual, and if it be violated, the penalty is imposed and enforced upon the individual, by the capture and confiscation of his property. Thus, the neutral state is not bound to restrain its subjects from engaging in contraband trade, or from violating the right of visitation and search, or the law of sieges and blockades; the law imposes upon the individual the duty of abstaining from such illegal acts, and, if guilty of a violation of this duty, he is the one to suffer the punishment due to the offence. Nor do the courts of a neutral country, as a general rule, enforce penalties for violations of neutral duty. As before remarked, there are certain obligations of neutrality, such as abstaining from acts of positive hostility, which the neutral state is bound to enforce with respect to its subjects; its own municipal laws in relation to such matters, are, of course, administered by its own tribunals. But such courts do not enforce penalties for carrying contraband of war, for a breach of blockade, or for violating the belligerent right of visitation and search. All such cases are left to be adjusted by the prize tribunals of the belligerents. (*Duer, On Insurance*, vol. 1, p. 749; *Webster, Dip. and Off. Papers*, pp. 309, 310; *Lee, Opinions U. S. Attys Genl.*, vol. 1, p. 61; *Bello, Derecho Internacional*, pt. 2, cap. 7; *Heffler, Droit International*, §§ 148, 172; *Ortolan, Diplomatie de la Mer*, tome 2, ch. 6; *De Cussy, Droit Maritime*, liv. 1, tit. 3, §§ 8, 9.)

§ 4. It may be stated, as a general principle which lies at the foundation of the rules of international law relating to this subject, that the violation of neutral duties is neither innocent nor lawful. It is not simply the penalty incurred by such violation that makes it wrong, as some have asserted; nor is it correct to say that, if the neutral merchant is willing to incur the risk of capture and condemnation, he may engage, with entire security of conscience, in a trade forbidden by the law of nations. The act is wrong in itself, and the penalty results from his violation of moral duty, as well as of law. The duties imposed upon the citizens and subjects flow from exactly the same principle as those which attach to the government of neutral state. "Where he supplies to the enemy," says Duer, "munitions or other articles contraband of war, or relieves with provisions, or otherwise, a blockaded port, although his motives may be different, his moral delinquency is precisely the same. By these acts he makes himself personally a party to a war, in which, as a neutral, he had no right to engage, and his property is justly treated as that of an enemy." "It appears, from recent decisions in the courts of common law in England, that the doctrine I have stated, has been there explicitly recognized." (*Duer, On Insurance*, vol. 1, pp. 754, 755, 772-775; *Harrott v. Wise*, 9 Barn. and Cress. Rep., p. 712; *Naylor v. Taylor*, 9 B. and Cress. Rep., p. 715; *Medeiros v. Hill*, 8 Bing. Rep., p. 281; *The Shepherdess*, 5 Rob. Rep., p. 264; *Pistoye et Duverdy, Traité des Prises*, tit. 6, ch. 2, sec. 3; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 14; *Heffter, Droit International*, § 148; *Hautefeuille, Des Nations Neutres*, tit. 15.)

§ 5. The first question which presents itself for consideration, as connected with neutral duties, is the transportation of goods of an enemy in a neutral vessel. "Whatever may be the true original abstract principle of natural law on this subject," says Mr. Wheaton, "it is undeniable that the constant usage and practice of belligerent nations, from the earliest times, have subjected enemy's goods, in neutral vessels, to capture and condemnation as prizes of war. This constant and universal usage, has only been interrupted by treaty stipulations, forming a temporary conventional law between the parties to such stipulations. The regulations and prac-

tice of certain maritime nations, at different periods, have not only considered the *goods* of an enemy laden in the ships of a friend, liable to capture, but have doomed to confiscation the neutral *vessel*, on board of which these goods were laden. This practice has been sought to be justified upon a supposed analogy with that provision of the Roman law, which involved the vehicle of prohibited commodities in the confiscation pronounced against the prohibited goods themselves. Thus, by the marine ordinance of Louis XIV., of 1681, all vessels laden with enemy's goods are declared lawful prizes of war. The contrary rule had been adopted by the preceding prize ordinances of France, and was again revived by the *règlement* of 1744, by which it was declared, that in case there should be found on board of neutral vessels, of whatever nation, goods or effects belonging to his Majesty's enemies, the goods or effects shall be good prize, and the vessel shall be restored. Valin, in his commentary upon the ordinance, admits that the more rigid rule, which continued to prevail in the French prize tribunals from 1681 to 1744, was peculiar to the jurisprudence of France and Spain; but that the usage of other nations was only to confiscate the goods of the enemy." The concurring testimony of text-writers is, that by the usage of the world, *neutral vessels* are not liable to condemnation for carrying *enemy goods*, whatever rule may be adopted or enforced with respect to the condemnation of the goods themselves. The transportation of enemy's goods in a neutral vessel, cannot, therefore, be regarded, in general, as a violation of any neutral duty, or as an act subject to any punishment. (*Wheaton, Elem. Int. Law*, pt. 4, ch. 3, §§ 19, 20; *Wheaton, Hist. Law of Nations*, pp. 111-119, 200-206; *Albericus Gentilis, Hosp. Advoc.*, lib. 1, cap. 27; *Valin, Com. Sur l'Ord.*, liv. 3, tit. 9.)

§. 6. The rule of international law, as stated above by Mr. Wheaton, with respect to enemy goods in neutral vessels, is sustained by English and American text-writers, and by the older continental publicists, as Bynkershoek, Heineccius, Cocceius, Vattel, Lampredi, Azuni, etc., while Hubner, Klüber, Rayneval, Jouffroy, Massé, Ortolan, and Hautefeuille, have not only attacked its principles, but have denied its correctness as a rule of law. Hautefeuille has discussed the

question at great length, and with marked ability. His conclusions are: "1st, That neutrals may freely transport, in neutral vessels, the goods of one of the belligerents, except contraband of war; 2d, That belligerents have not, in any case, the right to seize the property of their enemy in neutral vessels; in a word, that *free ships make free the merchandize which they carry, whatever may be the ownership.*" (*Wheaton, Elem. Int. Law*, pt. 4, ch. 3, §§ 19, 20; *Wildman, Int. Law*, vol. 2, p. 136; *Manning, Law of Nations*, pp. 203–280; *Azuni, Droit Maritime*, tome 2, ch. 3; *Lampredi, Du Commerce, etc.*, pt. 1, § 10; *Cocceius, De Jure Belli. in Amicos*; *Vattel, Droit des Gens*, liv. 3, ch. 7, § 115; *Heineccius, De Navium, etc.*, com. 2, §§ 8, 9; *Bynkershoek, Quaest. Jur. Pub.*, lib. 1, cap. 4; *Hubner, Saisie des Batimens*, tome 1, pt. 2, ch. 2; *Rayneral, De la Liberté des Mers*, tome 1, ch. 16; *Jouffroy, Droit Maritime*, pp. 188, et seq.; *Massé, Droit Commercial*, liv. 2, tit. 1, ch. 2, sec. 2; *Ortolan, Diplomatie de la Mer*, liv. 3, ch. 5; *Hautefeuille, Des Nations Neutres*, tit. 10; *Heffter, Droit International*, § 162; *De Cussy, Droit Maritime*, liv. 1, tit. 3, § 10; *Nau, Volkerseerecht*, § 130; *Loccenius, de Jure Maritimo*, lib. 2, cap. 4, § 12; *Zouch, Juris et Juridici Feclialis*, p. 2, § 8; *Molloy, de Jure Maritimo*, b. 1, c. 1, § 18; *Bello, Derecho Internacional*, pt. 2, cap. 8, § 1; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 14; *De Cussy, Droit Maritime*, liv. 1, tit. 3, § 10; *Lampredi, Commerce des Neutres*, pt. 1, § 10.)

§ 7. Another question, usually discussed in connection with the carrying of enemy's goods in neutral ships, is that of transporting neutral goods in enemy's ship. On this question, we quote some of the remarks of Mr. Wheaton, who has discussed these questions at considerable length, and with marked ability. "Although," he says "by the general usage of nations, independently of treaty stipulations, the goods of an enemy, found on board the ships of a friend, are liable to capture and condemnation, yet the converse rule, which subjects to confiscation the goods of a friend on board the vessels of an enemy, is manifestly contrary to reason and justice. It may, indeed, afford, as Grotius has stated, a presumption that the goods are enemy's property; but it is such a presumption as will readily yield to contrary proof, and not of that class of presumptions which the civilians call *presump-*

*tiones juris et de jure*, and which are conclusive upon the party. But, however unreasonable and unjust this maxim may be, it has been incorporated into the prize codes of certain nations, and enforced by them at different periods." The rule cannot be defended on sound principles, and is now admitted only when established by special compact, as an equivalent for the converse maxim, that *free ships make free goods*. This relaxation of belligerent pretensions may be fairly coupled with a correspondent concession by the neutral, that *enemy ships should make enemy goods*. (*Wheaton, Elem. Int. Law*, pt. 4, ch. 3, § 21; *The Atalanta*, 3 Wheaton Rep., p. 409; *The London Packet*, 5 Wheaton Rep., p. 132; *The Amiable Isabella*, 6 Wheaton Rep., p. 1; *Ortolan, Diplomatie de la Mer*, tome 2, ch. 5; *Garden, De Diplomatie*, liv. 7, §§ 7, 8; *Bello, Derecho Internacional*, pt. 2, cap. 8, § 2; *Heffter, Droit International*, §§ 163, 164; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 14; *Lampredi, Commerce des Neutres*, pt. 1, § 11.)

§ 8. The same author then proceeds to show that these two maxims are not only not inseparable, but have no natural connection. "The primitive law," he says, "independently of international compact, rests on the simple principle, that war gives a right to capture the goods of an enemy, but gives no right to capture the goods of a friend. The right to capture an enemy's property has no limit but of the *place* where the goods are found, which, if neutral, will protect them from capture. We have already seen that a neutral vessel on the high seas is *not* such a place. The exemption of neutral property from capture has no other exceptions than those arising from the carrying of contraband, breach of blockade, and other analagous cases, where the conduct of the neutral gives to the belligerent a right to treat his property as enemy's property. The neutral flag constitutes no protection to an enemy's property, and the belligerent flag communicates no hostile character to neutral property. States have changed this simple and neutral principle of the law of nations, by mutual compact, in whole or in part, according as they believed it to be for their interest; but the one maxim, that *free ships make free goods*, does not necessarily imply the converse proposition, that *enemy ships make enemy goods*. The

stipulation that neutral bottoms shall make neutral goods, is a concession made by the belligerent to the neutral, and gives to the neutral a capacity not given to it by the primitive law of nations. On the other hand, the stipulation subjecting neutral property, found in the vessel of an enemy, to confiscation as prize of war, is a concession made by the neutral to the belligerent, and takes from the neutral a privilege he possessed under the preëxisting law of nations; but neither reason nor usage renders the two concessions so indissoluble, that the one cannot exist without the other. It was upon these grounds that the supreme court of the United States determined that the treaty of 1795, between them and Spain, which stipulates that free ships shall make free goods, did not necessarily imply the converse proposition that enemy ships make enemy goods, the treaty being silent as to the latter; and consequently that the goods of a Spanish subject found on board the vessel of an enemy of the United States, were not liable to confiscation as prize of war." (*Kent, Com. on Am. Law*, vol. 1, pp. 126-181; *Wheaton, Elem. Int. Law*, pt. 4, ch. 8, § 22; *The Nereide*, 9 Cranch Rep., p. 388; *Ortolan, Diplomatie de la Mer*, tome 2, ch. 5; *Garden, De Diplomatie*, liv. 7, §§ 7, 8; *Bello, Derecho Internacional*, pt. 2, cap. 8, § 2; *Heffler, Droit International*, §§ 163, 164; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 14; *Hautefeuille, Des Nations Neutres*, tit. 15; *Poehls, Seerecht, etc.*, b. 4, § 518; *Pando, Derecho Pub. Int.*, p. 472, et seq.; *Kaltenborn, Seerecht, etc.*, § 284; *De Cussy, Droit Maritime*, liv. 1, tit. 3, § 10.)

§ 9. Although the United States, by their judicial tribunals and executive department, have recognized the right of capturing enemy's goods in neutral vessels, as a subsisting right under the law of nations, independently of conventional arrangements, they have always endeavored to incorporate the privilege of *free ships, free goods*, in their treaties, and advocated its adoption as a rule of international jurisprudence. It was incorporated in their treaties with France in 1778 and 1800, with the United Provinces in 1782, with Sweden in 1783, 1816, and 1827, with Prussia in 1785 and 1828, and with Spain in 1795; this last was modified in 1819, to the effect that the flag of the neutral should cover the property of the enemy only when his own government recognized the



principle. The rule, thus modified, was applied to their treaties with Columbia in 1824, with Brazil in 1828, with Chili in 1832, with Mexico in 1831, etc., etc. In no case have they concluded any treaty sustaining a different principle, except that of 1794, with England. They have invariably opposed the rule that *enemy ships make enemy goods*, and their supreme court, as has already been stated, refused to admit it, even against a neutral whose law of prize would subject the property of American citizens to condemnation, when found on board the vessels of her enemy. (*Wheaton, Elem. Int. Law*, pt. 4, ch. 3, § 22; *The Nereide*, 9 Cranch Rep., p. 388; *U. S. Statutes at Large*, vol. 8, pp. 262, 312, 393, 437, 472, 490; *Bello, Derecho Internacional*, pt. 2, cap. 8, § 2; *Heffter, Droit International*, § 164; *De Cussy, Droit Maritime*, liv. 1, tit. 3, § 10.)

§ 10. Prior to the war between the Allies and Russia, 1854, and the congress of Paris, 1856, the conventional law with respect to these two maxims has varied at different periods, according to the fluctuating policy and interests of the different maritime powers of Europe. It has been much more flexible than the consuetudinary law, but there has been a decided preponderance of modern treaties in favor of the maxim of *free ships free goods*, sometimes connected with that of *enemy ships enemy goods*, although the constant tendency has been to exclude the latter. France is almost the only government which has maintained that the goods of a friend laden on board of the ships of an enemy are good and lawful prize. This principle was incorporated into the French ordinances of 1538, 1543 and 1584. The contrary was provided in the declaration of 1650, but the former rule was reëstablished in 1681. In the numerous French ordinances and treaties after that period, France generally contended for the same principle, sometimes with, and sometimes without, the converse maxim of *free ships free goods*. In her earlier treaties, England adopted this last maxim, although she has since most strenuously opposed it, and her tribunals have uniformly condemned all enemy goods in neutral vessels, while neutral goods in enemy vessels have, as a general rule, been exempted from confiscation. While the other nations of Europe have adopted the same principle as the rule of

international law, they have generally, both in their ordinances and treaties, shown a willingness to adopt the maxim of *free ships free goods*. (*Manning, Law of Nations*, pp. 240, et seq.; *Wheaton, Elem. Int. Law*, pt. 4, ch. 3, § 23; *Flassan, de la Diplomatie*, tome 2, pt. 226; tome 3, p. 451; tome 7, pp. 183, 273; *De Cussy, Droit Maritime*, liv. 1, tit. 3, § 10; *Dumont, Corps Diplomatique*, tome 6, pt. 1, p. 342; *Schoell, Hist. de Traités de Paz*, tome 2, pp. 108, 121, etc.; *Hautefeuille, Des Nations Neutres*, tome 3, p. 270; *Martens, Recueil de Traités*, tome 5, p. 530; *Ortolan, Dip. de la Mer*, tome 2, ch. 5; *The Citade de Lisboa*, 6 Rob. Rep., p. 358; *The Erstern*, 2 Dallas Rep., p. 34; *The Mariana*, 5 Rob. Rep., p. 28; *Heffter, Droit International*, §§ 163, 164.)

§ 11. At the beginning of the recent war between the Allies and Russia, the different constructions put upon the law of nations by England and France, with respect to the maxims of *free ships free goods*, and *enemy ships enemy goods*, threatened to aggravate the difficulties to which war always subjects neutral commerce. Neutral property, which England would not condemn for being found in an enemy's vessel, would be good prize to the French cruiser; while the neutral ship, whose flag would protect, against France, enemy's property on board, might be sent by an English cruiser into an English port, her voyage broken up, and her cargo condemned, with no allowance for freight or damages. A compromise of principles was therefore necessary to the coöperation of their navies. A declaration was accordingly agreed upon by the two powers, in April, 1854, "waiving the right of seizing enemy's property laden on board a neutral vessel, unless it be contraband of war," and of "confiscating neutral property, not being contraband of war, found on board enemy's ships." The obnoxious pretensions of England were thus abandoned, as a consideration for obtaining from France additional concessions on her part. Nevertheless, the arrangement was, upon its face, only for the war, and was declared to be a temporary waiving of belligerent rights recognised by the law of nations. Either party might, at the close of that war, have resumed the pretensions thus abandoned, and have claimed in any future war, the belligerent rights, the exercise of which, was thus merely "waived." (*Wheaton, Elem. Int.*

*Law*, pt. 4, ch. 3, § 24, note; *Cong. Doc.*, 33 *Con.*, 1st. *Sess.* *H. R. Ex. Doc.* No. 103; *Ortolan*, *Diplomatie de la Mer*, tome 2 ch. 5; *Heffler*, *Droit International*, § 162-165; *De Cussy*, *Droit Maritime*, lib. 1, tit. 3, § 20.)

§ 12. All fears of such a result, however, were removed by the declaration of the congress of Paris, April 16th, 1856, by the plenipotentiaries of Great Britain, France, Russia, Austria, Prussia, Sardinia and Turkey. The second and third articles of this declaration are as follows: "2d. The neutral flag covers enemy's goods, with the exception of contraband of war." "3d. Neutral goods, with the exception of contraband of war, are not liable to capture under an enemy's flag." It was also provided in the final paragraph that, "the present declaration is not, and shall not be binding, except between those powers who have acceded or shall accede to it." More than a year prior to this declaration, the President of the United States had submitted, not only to the powers represented in the congress of Paris, but to all other maritime nations, two propositions which were substantially the same as those adopted, viz: "1. That free ships make free goods, that is to say, that the effects or goods belonging to subjects or citizens of a power or state at war are free from capture and confiscation when found on board of neutral vessels, with the exception of articles contraband of war." "2. That the property of neutrals on board an enemy's vessel is not subject to confiscation, unless the same be contraband of war." The second and third articles of the declaration of the congress of Paris have been formally approved by the President of the United States, and, it is believed, also by most of the other maritime nations of Europe. Nevertheless, as the principle must be regarded as established by a conventional agreement, rather than by the general law of nations, it is binding only upon those who have acceded or may accede to it. There is very little probability, however, that any nation will hereafter attempt to enforce rules of maritime capture in conflict with the principle thus established by the great powers of Europe and America. (*Phillimore*, *On Int. Law*, vol. 3, appendix, p. 850; *Ortolan*, *Diplomatie de la Mer*, tome 2, ch. 5; *Pistoye et Duverdy*, *Traité des Prises*, appendix; *Heffler*, *Droit International*, appen., no. 3; *De Cussy*,

*Droit Maritime*, tome 1, p. 553; *De Cussy, Precis Historique*, ch. 12.)

§ 13. It is an established rule of the law of prize, that all goods found in an enemy's ship is presumed to be enemy's property—*res in hostium navibus, præsumentur esse hostium donec probetur*. The evidence required to repel this presumption, depends upon the particular character of the case. If the character of the ship is certainly hostile, the neutral character of the goods must be shown by documents on board at the time of capture. If these are insufficient, further proof is never allowed, and the penalty of forfeiture attaches as a matter of course. "It has been truly observed," says Mr. Duer, "that any other course would subject the prize tribunals to endless impositions and frauds, and enable the enemy, thus obtaining the benefit of other proof, to evade, by supplying the documentary evidence, the just rights of the captor." Although it is the duty, in all cases, of a neutral claimant to establish his claim by positive evidence, it is only when the character of the ship is certainly hostile that the presumption of the hostility of the goods cannot be refuted by evidence additional to the documents found on the ship. In other cases, a reasonable time is allowed for the production of further proof, and it is only upon the failure to produce such proof, or its unsatisfactory nature when produced, that the court proceeds to a condemnation. (*Duer, On Insurance*, vol. 1, pp. 534, 535; *Loccenius, De Jure Maritimo*, lib. 2, cap. 4, § 11; *The Flying Fish*, 2 Gallis. Rep., pp. 374, 375; *The London Packet*, 1 Mason Rep., p. 14; *Pistoye et Duverdy, Des Prises*, tit. 6, ch. 2, § 4.)

§ 14. Another violation of neutral duty is the use of the flag and pass of the enemy. A neutral vessel is bound by the character which she has thus assumed, and the owner is not allowed to contradict his own acts, and to redeem his vessel from condemnation, by a disclaimer of the hostile character which, with a view to his own interests, or those of the enemy, he has elected she should bear. "If a neutral vessel," says Kent, "enjoys the privileges of a foreign character, she must expect, at the same time, to be subject to the inconveniences attaching to that character." But, as already stated, the foreign character thus assumed, is conclusive only

as *against* the owner, and not *in his favor*, for the real character of the vessel may always be pleaded against her, where the knowledge of that fact would justify a condemnation. The first branch of the rule is intended as a penalty for violation of neutral duty. (*Kent, Com. on Am. Law*, vol. 1, p. 85; *Duer, On Insurance*, vol. 1, pp. 535, 536; *Phillimore, On Int. Law*, vol. 3, § 485; *The Marianna*, 6 Rob. Rep., p. 24; *The Francis*, 8 Cranch. Rep., p. 418; *The Vigilantia*, 1 Rob. Rep., p. 1, 19, 26; *The Vrouw Anna Catharina*, 5 Rob. Rep., p. 161; *The Success*, 1 Dod. Rep., p. 131; *The Fortuna*, 1 Dod. Rep., p. 87.)

§ 15. But while the belligerent flag and pass are, in all cases, decisive, as to the owners, of the character of the ship, a distinction is made by the English courts in favor of the cargo of such ships, if the shipment were made in time of peace and plainly not in contemplation of war. Even where the goods themselves, for purposes having no relation to a future war, are clothed with a foreign character, now become hostile, the owner is not concluded, but is permitted to disprove the colorable title, and, upon due proof of his neutral character and actual ownership, his property is restored. On this subject we copy the remarks of Chancellor Kent. "Some countries have gone so far as to make the flag and pass of the ship conclusive on the cargo also; but the English courts have never carried the principle to that extent, as to cargoes laden before the war. The English rule is, to hold the ship bound by the character imposed upon it by the authority of the government from which all the documents issue. But goods which have no such dependence upon the authority of the state, may be differently considered; and if the cargo be laden in time of peace, though documented as foreign property in the same manner as the ship, the sailing under a foreign flag and pass has not been held conclusive as to the cargo. The doctrine of the federal courts in this country, has been very strict on this point, and it has been frequently decided, that sailing under the license and passport of protection of the enemy, in furtherance of his views and interests, was, without regard to the object of the voyage, or the port of destination, such an act of illegality as subjected both ship and cargo to confiscation as prize of war." The American deci-

sions referred to in the above extract, had reference to *American*, not *neutral*, goods in vessels sailing under the enemy's license and pass. It is strange that a writer so accurate as Kent, should have confounded two principles so entirely distinct. (*Kent, Com. on Am. Law*, vol. 1, p. 85; *Duer, On Insurance*, vol. 1, pp. 449, 450; *The Broeders Lust*, 5 Rob. Rep., p. 13, note; *The Vreede Sholtys*, 5 Rob. Rep., p. 12, note; *The Vrouw Elizabeth*, 5 Rob. Rep., p. 10; *The Ann Green*, 1 Gallis. Rep., pp. 286, 287; *The Julia*, 1 Gallis. Rep., p. 605; 8 Cranch. Rep., p. 181; *The Aurora*, 8 Cranch. Rep., p. 203; *The Hiram*, 8 Cranch. Rep., p. 444; *The Ariadne*, 2 Wheaton Rep., p. 143; *The Caledonia*, 4 Wheaton Rep., p. 100.)

§ 16. If a neutral vessel is captured while in the employment of the enemy or his officers, for purposes immediately or mediately connected with the operations of the war, the owner is never permitted to assert his claim. The nature of the service or employment is very justly deemed, in such a case, conclusive evidence of its hostile character. While thus employed the neutral vessel is as truly a vessel of the enemy, as if she were such by documentary title; and the owner is not allowed, for his own protection, to divest her of the character which she has thus assumed. Nor will the prize court listen to the plea that the vessel was impressed into such service by duress and violence. The answer of Sir Wm. Scott to such a defense, is most conclusive. When threats or force are employed for such a purpose by a belligerent, it is the duty of a neutral master, who has no means of resistance, to surrender his vessel, as a hostile seizure. He has no right, retaining his command, to navigate his vessel as a neutral, in the service and subject to the orders of the enemy. If he surrenders his vessel as a hostile seizure, he may appeal to his government for redress; but if he retain the command he will be treated as an enemy, and his vessel as the property of the belligerent. (*Duer, On Insurance*, vol. 1, pp. 452, 453; *The Carolina*, 4 Rob. Rep., p. 256; *Bello, Derecho Internacional*, pt. 2, cap. 8, § 6; *Heffter, Droit International*, § 171; *Hautefeuille, Des Nations Neutres*, tit. 18, ch. 1, § 8; *Phillimore, On Int. Law*, vol. 3, § 272; *The Orozembo*, 6 Rob. Rep., p. 433.)

§ 17. So, also, if the owner of a neutral ship has suffered his vessel to be employed in transporting military persons or military stores for the enemy, the vessel and cargo are condemned. Nor in such cases is it held necessary that the privity of the master, or his owners, be shown; it is sufficient that the employment be proven; no plea of ignorance or imposition is received. Where imposition is practiced to entrap a neutral vessel into a hostile service, it operates as force, and redress in the way of indemnification must be sought against those who, by imposition or deceit, exposed the property to capture. A different rule would afford impunity to such conveyance, as it would generally be impossible to prove the knowledge or privity of the master or owners. In the case of the transportation of ninety French mariners from Baltimore to Bordeaux, in a neutral vessel, it was contended that there was no proof that they were to be immediately employed in military service. This distinction was discarded by the prize court. It was enough, said Sir Wm. Scott, that they were military persons, and that their transportation, the act of their government. It was not the mere fact of carrying military persons, but the fact of the vessel letting herself out, in a distinct manner, under a contract, for that purpose. If a military officer were going merely as an ordinary passenger, as other passengers, and at his own expense, neither that, nor any other British tribunal, had ever laid down the principle to the extent of condemning a vessel for such transportation. (*Ortolan, Diplomatie de la Mer*, tome 2, ch. 6; *Duer, On Insurance*, vol. 1, pp. 454-455; *The Friendship*, 6 Rob. Rep., p. 420; *The Orozembo*, 6 Rob. Rep., p. 434; *Bello, Derecho Internacional*, pt. 2, cap. 8, § 6; *Hautefeuille, Des Nations Neutres*, tit. 8, sec. 4; *Phillimore, On Int. Law*, vol. 3, § 272; *The Caroline*, 4 Rob. Rep., p. 256; *The Commercen*, 1 Wheaton Rep., p. 391.)

§ 18. A neutral vessel fraudulently carrying the dispatches of an enemy, is, as a general rule, liable to condemnation. Public dispatches are defined to embrace all official communications of public officers relating to public affairs. "The carrying of two or three cargoes of stores," says Kent, abbreviating the language of Sir Wm. Scott, "is necessarily an assistance of a limited nature; but in the transmission of

dispatches, may be conveyed the entire plan of campaign, and it may lead to a defeat of all the projects of the other belligerent in that theatre of the war. The appropriate remedy for this offense, is the confiscation of the ship; and in doing so, the courts make no innovation on the ancient law, but they only apply established principles to new combination of circumstances. There would be no penalty in the mere confiscation of the dispatches. The proper and efficient remedy is the confiscation of the vehicle employed to carry them; and if any privity subsists between the owners of the cargo and the master, they are involved by implication in his delinquency. If the cargo be the property of the proprietor of the ship, then, by the general rule, *ob continentiam delicti*, the cargo shares the same fate, and especially if there was an active interposition in the service of the enemy, concerted and continued in fraud." The mere fact that such dispatches were found on board a neutral vessel, is not sufficient to produce her condemnation; for the rule refers to a *fraudulent* carrying of the dispatches of the enemy, and it is presumed that it would not apply to regular postal packets, whose mails, by international conventions, are distributed throughout the civilized world; nor even to merchant vessels which, in some countries, are obliged to receive letters and mail matter sent to them from the post-offices. The master must necessarily be ignorant of the contents of the letters so received, and, in the absence of all suspicion of *fraud*, or of interposition in the service of the enemy, the mere carrying of an enemy's dispatches, under such circumstances, could hardly be regarded as a delinquency under the law of nations, and a violation of neutral duty. The case is very different where the neutral vessel is employed by the belligerent for that purpose, or carries them fraudulently, and in the service used for the benefit of a belligerent. Another important exception to this rule, is the conveyance of the dispatches of an ambassador, or other public minister of the enemy, resident in a neutral state. In the language of Sir Wm. Scott, "They are dispatches from persons who are, in a peculiar manner, the favorite object of the protection of the law of nations, residing in the neutral country for the purpose of preserving the relations of amity between that state



and their own government. On this ground a very material distinction arises, with respect to the right of furnishing the conveyance. The neutral country has a right to preserve its relations with the enemy, and you are not at liberty to conclude that any communication between them can partake, in any degree, of the nature of hostility against you. The limits assigned to the operations of war against ambassadors, by writers on public law, are, that the belligerent may exercise his right of war against them, wherever the character of hostility exists; he may stop the ambassador of his enemy on his passage; but when he has arrived in the neutral country, and taken on himself the functions of his office, and has been admitted in his representative character, he becomes a *middle man*, entitled to peculiar privileges, as set apart for the preservation of the relations of amity and peace, in maintaining which all nations are, in some degree, interested."

\* \* \* "The practice of nations has allowed to neutral states the privilege of receiving ministers from the belligerent powers, and of an immediate negotiation with them." (*Bello, Derecho Internacional*, pt. 2, cap. 8, § 6; *Wheaton, Elem. Int. Law*, pt. 4, ch. 3, § 25, note; *The Caroline*, 6 Rob. Rep., p. 461; *The Madison*, 1 Edw. Rep., p. 224; *The Commercen*, 1 Wheaton Rep., p. 382; *Hautefeuille, Des Nations Neutres*, tit. 8, sec. 4; *Phillimore, On Int. Law*, vol. 3, § 271; *Ortolan, Diplomatie de la Mar.*, liv. 3, ch. 6; *Duer, On Insurance*, vol. 1, p. 455; *Kent, Com. on Am. Law*, vol. 1, p. 152; *The Atalanta*, 6 Rob. Rep., p. 440; *The Rapid*, 1 Edw. Rep., p. 228.)

§ 19. If a neutral engages in a commerce which is exclusively confined to the subjects of another country, and which is interdicted to all others, so that it cannot be carried on at all in the name of a foreigner, such a commerce is considered so entirely national as to follow the situation of the country, and to impress its hostile character upon the property engaged in it. In the war of 1756, the French government allowed the Dutch, then neutral, to carry on the commerce between the mother country and her colonies, under special licenses granted for this particular purpose, other neutrals being excluded from the same trade. Vessels so employed were captured by British cruisers, and, together with their cargoes, condemned by the British prize courts. In the

opinion of these courts the vessels were to be considered like transports in the enemy's service, and the property as so completely identified with the enemy's interests as to acquire a hostile character. The doctrine of these decisions has been frequently affirmed by the prize courts of England and America, and by the opinions of the most eminent text-writers of other countries. It has generally been designated by publicists as the "rule of the war of 1756." (*Manning, Law of Nations*, pp. 195, et seq.; *Phillimore, On Int. Law*, vol. 3, §§ 214, et seq.; *Wheaton, Elem. Int. Law*, pt. 4, ch. 3, § 27; *Wheaton, Reports*, vol. 1, appendix, note 3, p. 506; *Story, Life of*, vol. 1, p. 288; *Duer, On Insurance*, vol. 1, pp. 699, et seq.; *Wildman, Int. Law*, vol. 2, pp. 51, 71, 95; *Berens v. Rucker*, 1 W. Black. Rep., p. 814; *Brymer v. Atkyns*, 1 H. Black. Rep., p. 191.)

§ 20. Few now contest the correctness of the rule of 1756, that where neutrals, by a special indulgence, are permitted, in time of war, to engage in a commerce of the enemy which is purely national, and from which they are excluded in time of peace, necessarily impresses them with a hostile character. But during the wars of 1793 and 1801, Great Britain attempted to give this rule a much greater extension, and asserted that where a commerce, which had previously been regarded as a national monopoly, is thrown open in time of war to all nations, without reserve, by a general, and, on its face, a permanent regulation, neutrals have no right to avail themselves of the concession, but that their entrance into the trade thus opened, is a criminal departure from the impartiality they are bound to observe. It was formerly the policy of the great European powers to confine exclusively to their ships and subjects the trade between their own ports, and between the mother country and its colonies. During the wars referred to, some of the continental states abolished this monopoly, and opened their coasting and colonial trade to all nations without reserve. But England contended that such a change of policy by a belligerent in time of war was not sanctioned by the law of nations, and neutral vessels engaged in such trade were seized by her cruisers, and condemned by her courts of admiralty. The confiscation of a vast number of American ships, with valuable cargoes of

colonial produce, was the principal fruit of this rule of British law and British policy. But the government of the United States most earnestly and energetically remonstrated against the doctrine, as a modern and violent innovation, unjust in its principle, ruinous in its application, and without the sanction of international law. Neither the British orders in council, nor the decisions of British prize courts, seem to have adopted any fixed principle with respect to the prohibition of neutrals from engaging in the colonial and coast trade of a belligerent state. Soon after the commencement of the war of 1793, England intrusted her cruisers "to bring in for lawful adjudication all vessels laden with goods, the produce of any colony of France, or carrying provisions or supplies for the use of any such colony," thus prohibiting *all* trade between neutrals and the colonies of the enemy, even that permitted in time of peace. The instructions of January 8th, 1794, were, "to bring in all vessels laden with goods, the produce of the French West India islands, and coming directly from any port of the said islands to any port in Europe," thus permitting American vessels to trade directly between the United States and the French colonies, but not between them and any port in Europe, even though neutral. But, in 1798, the instructions were still further extended so as to permit neutrals to trade between the enemy's colonies and any port of Great Britain, or any port of a country in Europe to which the neutral ship might belong. It will be observed that these relaxations virtually amounted to an abandonment of the principle upon which the British extension of the rule of 1756, was claimed to be founded. Nor was there an entire uniformity in the decisions of the courts, either with respect to the exact limits of the rule, or the penalty to be inflicted on the neutral for its violation. In some of the earlier wars the cargo was condemned, and the ship restored, without freight, but, subsequently, both ship and cargo were condemned. At one time the prohibition was construed to extend only to trade thrown open by the enemy temporarily or during the war; but was afterward extended to trade made general by regulation declared, in terms, to be permanent. Moreover, the general principle, that the trade of neutrals with the colonies of the enemy,

because first opened by them during the war, seems, in some cases, to have been abandoned by the court, and the trade declared to be unlawful only when its direct and immediate tendency was to relieve the colonies from a hostile pressure, so close and imminent, that, but for the assistance rendered them by neutral trade, it would inevitably compel their surrender. (*Manning, Law of Nations*, pp. 195, et seq.; *Duer, On Insurance*, vol. 1, pp. 699, 717; *Phillimore, On Int. Law*, vol. 3, § 225; *Wheaton, Elem. Int. Law*, pt. 4, ch. 8, § 27; *Wheaton, Hist. Law of Nations*, pp. 373, et seq; *The Rebecca*, 2 Rob. Rep., p. 101; *The Immanuel*, 2 Rob. Rep., p. 206; *The Rose*, 2 Rob. Rep., p. 206; *The Minerva*, 3 Rob. Rep., p. 232; *The Jonge Thomas*, 3 Rob. Rep., p. 233, note; *The Wilhelmina*, 4 Rob. Rep. appen. a, p. 4; *The Nancy*, 4 Rob. Rep., appen. a, p. 6; *British Orders in Council*, November 6th, 1793; January 8th, 1794; February 25th, 1798; *Garden, De Diplomatie*, liv. 7, § 9; *Heffler, Droit International*, § 174.)

§ 21. The distinction between the rule of the war of 1756, and that contended for by Great Britain, generally known as the rule of 1793, is quite obvious. It is thus pointed out by Mr. Wheaton: "There is," he says, "all the difference between this principle and the more modern doctrine which interdicts to neutrals, during war, all trade not open to them in time of peace, that there is between the granting by the enemy of special licenses to the subjects of the opposite belligerent, protecting their property from capture in a particular trade which the policy of the enemy induces him to tolerate, and a general exemption of such trade from capture. The former is clearly cause of confiscation, whilst the latter has never been deemed to have such an effect. The rule of the war of 1756, was originally founded upon the former principle; it was suffered to lay dormant during the war of the American revolution, and, when revived at the commencement of the war against France, in 1793, was applied with various relaxations and modifications to the prohibition of all neutral traffic with the colonies, and upon the coasts of the enemy." This distinction is also clearly pointed out by Mr. Duer; who has most conclusively answered the arguments of Sir William Scott. (*Wheaton, Elem. Int. Law*, pt. 4, ch. 3, § 27; *Wheaton, Hist. Law of Nations*, pp. 373, et

seq.; *Wheaton, Rep.*, vol. 1, appendix No. 8, p. 506; *Bello, Derecho Internacional*, pt. 2, cap. 8, § 8; *Heffler, Droit International*, § 174; *Duer, On Insurance*, vol. 1, pp. 707-717; *Manning, Law of Nations*, ch. 5; *Kent, Com. on Am. Law*, vol. 1, p. 82; *Phillimore, On Int. Law*, vol. 8, §§ 212, et seq.; *Sir William Temple's Works*, p. 313.)

§ 22. The application of this rule of 1793, made by Great Britain, fully illustrates its objectionable character, even in its most modified form. As explained by the British courts of admiralty, and relaxed by the orders in council, this rule permitted the importation of the produce of the enemy's colonies into a neutral country, and its exportation thence to other countries. A question, however, arose as to what constituted the evidence of importation and exportation by the neutral? An American vessel had imported goods from Havana, which had been landed in the United States and duties on them paid to the American government. They had afterwards been carried in the same vessel as a part of a cargo from a port of Massachusetts to Spain. The vessel was captured by British cruisers, and the captors insisted upon a condemnation on the ground of *continuity of voyage*; but Sir William Scott decreed the restoration of ship and cargo, on the ground, that the landing of the goods and the payment of duties in a neutral port were sufficient evidence of an importation in good faith. This decision was rendered in 1800; but in 1805 the lords of appeal discovered that these *criteria* of a *bona fide* importation might be fallacious, and therefore were not to be held as conclusive evidence of a breach in the voyage. If the circumstances of their re-exportation were such as to indicate that the original importation into the neutral port was intended for that purpose, the trade was declared illegal, and the vessels and cargoes condemned. (*Chitty, Law of Nations*, pp. 176, et seq.; *Duer, on Insurance*, vol. 1, pp. 719-725; *The Polly*, decided in 1800, 2 Rob. Rep., p. 361; *The Essex*, decided in 1805, 5 Rob. Rep., p. 369; *The William*, 5 Rob. Rep., p. 387.)

§ 23. The effect of this application of the British rule to the continuity of the voyage from an enemy's colony to a neutral port, and thence to the mother country, or to a port

of a belligerent, produced a most disastrous effect upon American commerce. The merchants of the United States, relying upon the rule, recognized by Sir William Scott, that the landing of the goods and the payment of the duties in the neutral port, would be regarded as conclusive evidence that the continuity of the voyage had been broken so as to legalize a subsequent exportation, (although perhaps the language of the judge did not fully warrant the inference,) had engaged largely in trade with the colonies of France and Spain, reëxporting the same goods to European ports. When this trade had existed without interruption for some years, the unexpected decision of the lords of appeal on the continuity of the voyage, caused the seizure and condemnation of a vast number of American ships and cargoes. If the doctrine of the illegality of neutral trade between the American colonies of the belligerents and European ports be admitted as correct, the decision of the lords of appeal, as rendered by Sir William Grant, on the continuity of the voyage will probably follow as a necessary consequence. But this very uncertainty in the application of the rule of 1793, and the disastrous results produced upon American commerce by a misconception of a single question growing out of that rule, furnish abundant proof of its vague and equivocal character, its tendency to entrap neutral merchants to their ruin, and the arbitrary power over neutral commerce conferred upon a belligerent's court of admiralty by the uncertainty of its application. (*Duer, On Insurance*, vol. 1, pp. 719–725; *Kent, Com. on Am. Law*, vol. 1, p. 85, note; *The Polly*, 2 Rob. Rep., p. 361; *The Essex*, 5 Rob. Rep., p. 369; *The William*, 5 Rob. Rep., p. 395; *The Maria*, 5 Rob. Rep., p. 365.)

§ 24. Notwithstanding the very able and exceedingly plausible arguments advanced by British statesmen and jurists, in support of the rule of 1793, they failed to satisfy, at the time, other countries of its justice or legality. And the discussions which have taken place between writers on public law, since party feelings and national prejudices arising out of the wars in which the rule was enforced by Great Britain have ceased, have greatly shaken, even British faith, in its correctness. Indeed, many of her ablest writers and jurists

have now abandoned the extreme grounds taken at that time by her government and courts of prize. Mr. Phillimore, her most recent writer on international law, whose work exhibits much ability and learning, and who certainly is not backward in defending British pretensions, fully adopts Mr. Justice Story's opinion with respect to the rules of 1756 and 1793. This opinion was as follows; 1st, That coasting trade, being by its nature exclusively national, neutrals cannot engage in it, when thrown open during war; but that the British extension of this doctrine, to cases where a neutral traded between ports of the enemy with a cargo taken in at a neutral country, was unjust; and 2d, with respect to colonial trade, that, if a neutral engage in trade between the mother country and the colony which is thrown open merely in war, he is liable, in most instances, to the same penalty. "But," continues Story, "the British have extended this doctrine to all intercourse with the colony, even from a neutral country, and herein, it seems to me, they have abused the rule. This, at present, appears to me to be the proper limits of the rule, as to the colonial and the coasting trade; and the rule of 1756 (as it was at that time applied,) seems to me well founded; but its late extension is reprehensible." (*Phillimore, On Int. Law*, vol. 3, §§ 215, 225; *Story, Life and Letters*, vol. 1, pp. 287, 288; *Wheaton, Reports*, vol. 1, appendix, note 3, p. 506; *Bello, Derecho Internacional*, pt. 2, cap. 8, § 8; *Heffler, Droit International*, § 174.)

§ 25. The British extension of the rule of 1756 to the doctrine of 1793, and its subsequent application to the ruin of American commerce, drew from the government of the United States an earnest and energetic remonstrance. From the grounds then assumed, with respect to the rule of 1793, there is no reason to believe that this government will ever depart. They were taken on full deliberation, and maintained at the time with signal ability, and they have since been adopted by all her ablest statesmen and writers on public law. Some, not properly distinguishing between the principles of the rule of 1793 and that of 1756, boldly attacked the doctrine of the latter as unsanctioned by the law of nations, but it has now become the settled conviction that its main principles, when properly limited and distin-

guished from that of 1793, are just and correct. At the same time, the British rule is regarded as a modern innovation, forming no part of the general and permanent code of international jurisprudence,—an innovation so unjust and ruinous to neutral commerce, that neutral states are bound to resist any new attempt to enforce its application. There is no doubt that the United States would now regard any attempt to apply it to American commerce, as an act of direct and immediate hostility. (*Duer, On Insurance*, vol. 1, p. 701; *Monroe, Letter to Lord Mulgrave*, Sept. 23d, 1805; *Madison, Letter to Monroe and Pinkney*, May 17th, 1806; *Wheaton, Elem. Int. Law*, pt. 4, ch. 3, § 27; *Wheaton, Hist. Law of Nations*, pp. 374, et seq.; *Wheaton, Reports*, vol. 1, appendix, note 3, p. 506; *Story, Life and Letters*, vol. 1, p. 287; *Bello, Derecho Internacional*, pt. 2, cap. 8, § 8.)

§ 26. But there is very little probability that Great Britain will attempt to revive it in any future war, not only on account of the resistance it will be certain to prevoke, and the exceedingly doubtful character of the rule itself, but from the great change in British opinion on this subject, and more particularly from the changes which have since been made in the colonial system of the powers of Europe. The colonial trade of England being now open to the navigation of the world, the theory, on which the restriction of 1793 was based, necessarily falls to the ground. Nevertheless, a treatise on international law would be very incomplete without an examination and discussion of a question so recently regarded of paramount importance, and which caused the condemnation of such a vast amount of American property. (*Wheaton, Elem. Int. Law*, pt. 4, ch. 3, § 27; *Duer, On Insurance*, vol. 1, p. 717; *Phillimore, On Int. Law*, vol. 3, § 212; *Order in Council*, April 15th, 1854; *Edinburg Review*, No. 203, art. 6.)



## CHAPTER XXVII.

## PACIFIC INTERCOURSE OF BELLIGERENTS.

## CONTENTS.

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§ 1. The usage of civilized nations has introduced a certain friendly intercourse in war, technically called *commercium belli*, by which its violence may be allayed, so far as is consistent with its object and purpose, and a way be kept open which may lead, in time, to an adjustment of differences, and, ultimately, to peace. Were all pacific communications between armies absolutely cut off, war would not only become unnecessarily cruel and destructive, but there would be no chance of terminating it, short of the total annihilation of the bellige-

rents. Grotius has devoted an entire chapter to prove, by the concurring testimony of all ages and all nations, that *good faith* should always be observed between enemies in war. Even Bynkershoek, who adopted sentiments respecting the rights of war now happily rejected by the whole civilized world, prohibits perfidy towards an enemy, "not," he says, "because anything is unlawful towards an enemy, but because, when our faith has been pledged to him, so far as the promise extends, he ceases to be an enemy." Vattel says, that the faith of promises made to an enemy is absolutely essential for the common safety of mankind, and is, therefore, held sacred by all civilized nations. (*Grotius, de Jure Bel. ac Pac.*, liv. 3, ch. 21; *Bynkershoek, Quaest. Jur. Pub.*, cap. 1; *Vattel, Droit des Gens*, liv. 3, ch. 10, § 174; *Puffendorff, de Jur. Nat. et Gent.*, lib. 8, cap. 7, § 2; *Virgil, Aeniad*, 10, 532; *Tacitus, Ann.*, lib. 14, cap. 33; *Rutherford, Institutes*, b. 2, ch. 9, § 22; *Phillimore, On Int. Law*, vol. 3, §§ 97, et seq.; *Heffler, Droit International*, § 141.)

§ 2. Belligerent states, and their armies and fleets, frequently have occasion, during the continuance of a war, to enter into agreements of various kinds; sometimes for a general or partial suspension of hostilities, for the capitulation of a place, or the surrender of an army, for the exchange of prisoners, or the ransom of captured property; and sometimes for the purpose of regulating the general manner of conducting hostilities, or the mode of carrying on the war. All these agreements, of whatsoever kind, are included under the general name of *compacts* or *conventions*. These compacts which relate to the pacific intercourse of the belligerents, suppose the war to continue; those which put an end to it, come under the general head of *treaties of peace*, which will be considered in another chapter. (*Martens, Precis du Droit des Gens*, § 290; *Vattel, Droit des Gens*, liv. 3, ch. 16, § 233; liv. 4, ch. 2, § 9; *Kent, Com. on Am. Law*, vol. 1, pp. 159–168; *Wheaton, Elem. Int. Law*, pt. 4, ch. 2, §§ 18–28; *Rayneval, Inst. du Droit Nat.*, etc., liv. 3, ch. 27; *Bello, Derecho Internacional*, pt. 2, cap. 9, § 2; *Burlamaqui, Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 10.)

§ 3. If the cessation of hostilities is only for a very short period, or at a particular place, or for a temporary purpose,

such as for a parley, or a conference, or for removing the wounded, and burying the dead, after a battle, it is called a *suspension of arms*. This kind of compact may be formed between the immediate commanders of the opposing forces, and is obligatory upon all persons under their respective commands. Even commanding officers of detachments may enter into this kind of compact, but such an agreement can only bind the detachment itself; it cannot affect the operations of the main army, or of other troops not under the authority of the officer making it. A suspension of arms is only for a temporary purpose, and for a limited period. If the suspension of hostilities is for a more considerable length of time, or for a more general purpose, it is called a *truce* or an *armistice*. Truces are either partial or general. A partial truce is limited to particular places, or to particular forces, as a suspension of hostilities between a town or fortress and the forces by which it is invested, or between two hostile armies or fleets. But a general truce applies to the general operations of the war, and whether it be for a longer or shorter period of time, it extends to all the forces of the belligerent states, and restrains the state of war from producing its proper effects, leaving the contending parties, and the questions between them in the same situation in which it found them. Such a truce has sometimes been called a *temporary peace*; "but when we call it so," says Rutherford, "we use the word peace only in opposition to *acts* of war, and not in opposition to a *state* of war." (*Puffendorf, de Jur. Nat. et Gent.*, lib. 8, cap. 7, § 3; *Grotius, de Jur. Bel. ac Pac.*, lib. 3, cap. 21, § 1; *Rutherford, Institutes*, b. 2, ch. 9, § 22; *Vattel, Droit des Gens*, liv. 3, ch. 16, § 235; *Martens, Precis du Droit des Gens*, § 293; *Wheaton, Elem. Int. Law*, pt. 4, ch. 2, § 19; *Garden, De Diplomatie*, liv. 5, § 16; *Kent, Com. on Am. Law*, vol. 1, p. 159.)

§ 4. Such a general suspension of hostilities throughout the nation, can only be made by the sovereignty of the state, either directly, or by authority specially delegated. Such authority, not being essential to enable a general or commander to fulfil his official duties, is never implied, and, in such a case, the enemy is bound to see that the agent is specially authorized to bind his principal. But a partial

truce may be concluded between the military and naval commanders of the respective forces, without any special authority for that purpose, where, from the nature and extent of their commands, such authority is necessarily implied, as essential to the fulfilment of their official duties. If the commander, in making such a compact, has abused his trust to the advantage of the enemy, he is accountable to his own state for such abuse. "The nature of his trust implies," says Rutherford, "that he has power to enter into a compact of this sort; and this power is sufficient to render the compact valid. The obligation that he is under, not to abuse his trust, regards his own state only, and not the enemy; and, consequently, it cannot effect the validity of the compact which he makes with the enemy." A case occurring in the recent war between the United States and Mexico, serves to point out the limitation of the foregoing rule, with respect to the authority of a commander to make a general truce or armistice. By the convention of February 29th, ratified by General Butler, March 5th, and published in general orders No. 18, March 6th, 1848, it was stipulated that the Mexican civil authorities, political, administrative, and judicial, were to be reëstablished and installed in their respective offices. The terms of the convention were general, and included the entire republic of Mexico. But California, although a part of the Mexican territory, had been organized into a separate military department, entirely independent of the general commanding in Mexico. Pico, the Mexican Governor of California, basing himself on the words of this convention, demanded of the American military governor of that department, to be reinstated and recognized in his official position and character. The American commander not only refused to comply with Pico's demand, but adopted pretty severe measures to prevent any attempt on his part to exercise authority in California. If the convention, entered into by General Butler in the capitol of Mexico, was really intended to include California, as its terms would seem to indicate, he, undoubtedly, exceeded his powers, and the armistice, so far as concerned California, was utterly null and void. (*Kent, Com. on Am. Law*, vol. 1, p. 159; *Wheaton, Elem. Int. Law*, pt. 4, ch. 2, § 20; *Rutherford, Institutes*, b. 2, ch. 9, § 21;

*Vattel, Droit des Gens*, liv. 3, ch. 16, §§ 235-238; *Grotius, de Jure Bel. ac Pac.*, lib. 3, cap. 22, § 8; *Puffendorf, de Jure Nat. et Gent.*, lib. 8, cap. 7, § 15; *Phillimore, On Int. Law*, vol. 3, § 106; *Martens, Precis du Droit des Gens*, §§ 293, 294; *Bello, Derecho Internacional*, pt. 2, cap. 9, § 2; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 13; *Burlamaqui, Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 12; *Butler, General Orders*, No. 18, March 6th, 1848; *Mason to Adj't Gen'l*, August 23d, 1848; *Ex. Doc.*, No. 17, *H. R.*, 31 Cong., 1st sess., pp. 601, et seq.)

§ 5. A truce binds the contracting parties from the time of its conclusion, unless otherwise specially provided; but it does not bind the individuals of the nation so as to make them personally responsible for a breach of it, until they have had actual or constructive notice. If, therefore, individuals, without a knowledge of the suspension of hostilities, kill an enemy or destroy his property, they do not, by such acts, commit a crime, nor are they bound to make pecuniary compensation; but, if prisoners are taken, or prizes captured, the sovereign is under obligation to immediately release the former, and restore the latter. To prevent the danger and damage that might arise from acts committed in ignorance of the truce, it is usual to fix a prospective period for the cessation of hostilities in different places, with due reference to their distance, and the means of communicating with them; it is also proper to provide for cases which do not come within the ordinary rules of notice, such as hostile vessels meeting at sea. But the state is responsible for the acts of its subjects after actual or constructive notice of the truce; it must punish them for the offense, and make ample compensation for the damage; should the state neglect or refuse justice on the complaints of the party injured, it becomes accessory to the wrong, and violates the compact. (*Wheaton, Elem. Int. Law*, pt. 4, ch. 2, § 21; *Kent, Com. on Am. Law*, vol. 1, p. 160; *Rutherford, Institutes*, b. 2, ch. 9, § 22; *Vattel, Droit des Gens*, liv. 3, ch. 16, § 239; *Grotius, de Jur. Bel. ac Pac.*, lib. 3, cap. 21, § 5; *Puffendorf, de Jur. Nat. et Gent.*, lib. 8, cap. 7, § 8; *Phillimore, On Int. Law*, vol. 3, § 116; *Wildman, Int. Law*, vol. 1, p. 28; *Bello, Derecho Internacional*, pt. 2, cap. 9, § 2; *Heffter, Droit International*, § 142; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 13; *Real, Science du Gouvernement*, tome 5, ch. 3, sec. 2.)

§ 6. During the continuance of a general truce, each party to it may, within his own territories, do whatever he would have a right to do in time of peace, such as repairing or building fortifications, constructing and fitting out vessels, levying and disciplining troops, casting cannon and manufacturing arms, and collecting provisions and munitions of war. He may also move his armies from one part of his territory to another, not occupied by the enemy, and call home, or send abroad upon the ocean his vessels of war. And, in the theatre of hostilities, and in the face of the enemy, he may do whatever, under all the circumstances, would be deemed compatible with good faith and the spirit of the agreement. In the case of a truce between the governor of a fortress or fortified town, and the general or admiral investing it, either party is at liberty to do what he could safely have done if hostilities had continued. For example, the besieged may repair his material of war, replenish his magazines, and strengthen his works, if such works were beyond the reach of the enemy at the beginning of the truce, and if the provisions and succors are introduced into the town in a way or through passages which the besieging army could not have prevented. But the besieged cannot construct or repair works of defense, if he could not safely have done this in case the hostilities had continued; nor introduce provisions, military munitions or troops through passages which were occupied or commanded by the enemy at the time of the cessation of hostilities; nor can the besiegers continue works of attack which might have been prevented or interrupted by the besieged; for all acts of this kind would be making a mischievous and fraudulent use of the agreement, and violating its good faith and spirit; the general meaning of such compacts is, that all things within the limits of the theatre of immediate operations, shall remain as they were at the moment of the conclusion of the truce. To receive and harbor deserters within such limits, is an act of hostility, and, therefore, a violation of the complied conditions of a truce. (*Wheaton, Elem. Int. Law*, pt. 4, ch. 2, § 22; *Puffendorf, de Jur. Nat. et Gent.*, lib. 8, cap. 7, §§ 9, 10; *Grotius, de Jur. Bel. ac Pac.*, lib. 3, cap. 21, §§ 8, et seq.; *Phillimore, On Int. Law*, vol. 3, §§ 197, 198; *Kent, Com. on Am. Law*, vol. 1, p. 16;

*Vattel*, *Droit des Gens*, lib. 3, ch. 16, §§ 245-247; *Rutherford*, *Institutes*, b. 2, ch. 9, § 22; *Wildman*, *Int. Law*, vol. 2, pp. 27, 28; *Rayneval*, *Just. du Droit Nat. etc.*, liv. 3, ch. 7; *Bello*, *Derecho Internacional*, pt. 2, cap. 9, § 2; *Heffler*, *Droit International*, §§ 142-143; *Riquelme*, *Derecho Pub. Int.*, lib. 1, tit. 1, cap. 13; *Burlamaqui*, *Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 11; *Real*, *Science du Gouvernement*, tome 5, ch. 3, sec. 2.)

§ 7. Where a truce is granted for a certain specified object, its effects are limited to the purpose mentioned, and if either party should attempt to perform any act to the disadvantage of the other, not comprehended in the object of such truce, this other party has the undoubted right to hinder it by force, notwithstanding the compact. So, where the truce is conditional, and the conditions which have been agreed upon are broken by one party, the truce is no longer binding upon the other. "All truces granted for a certain purpose," says *Rutherford*, "are confined to this purpose; and the party who makes use of the cessation of hostilities, to do anything that is not included within this purpose, and that is to the disadvantage of the other party, breaks the truce. For as this purpose is the sole reason of the compact, the right, arising from the compact, can extend no farther than this purpose extends." "And usually," says the same author, "a breach of truce, on one part, will justify the other part in beginning hostilities again before the time of the truce would have otherwise expired." (*Kent*, *Com. on Am. Law*, vol. 1, p. 161; *Wheaton*, *Elem. Int. Law*, pt. 4, ch. 2, § 22; *Grotius*, *De Jur. Bel. ac Pac.*, lib. 3, cap. 21, §§ 6-10; *Vattel*, *Droit des Gens*, liv. 3, ch. 16, §§ 248-250; *Rutherford*, *Institutes*, b. 2, ch. 9, § 22; *Puffendorf*, *De Jur. Nat. et Gens*, lib. 8, cap. 7, § 10; *Phillimore*, *On Int. Law*, vol. 3, §§ 117, 118; *Wildman*, *Int. Law*, vol. 1, p. 28; *Heineccius*, *Element. Juris.*, lib. 2, § 210, note; *Bello*, *Derecho Internacional*, pt. 2, cap. 9, § 2; *Riquelme*, *Derecho Pub. Int.*, lib. 1, tit. 1, cap. 13; *Burlamaqui*, *Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 11; *Real*, *Science du Gouvernement*, tome 5, ch. 3, sec. 2.)

§ 8. Truces, and other military compacts are, to be interpreted by the same rules as treaties or other agreements. Most questions relating to such compacts may be easily determined, either by considering the nature and character

of the compact itself, or by applying to it the common rules of interpretation. Nevertheless, a difference of opinion will often arise respecting the proper construction to be given to particular terms, which are, in their nature, ambiguous. Thus, writers on the laws of war have discussed the question whether a truce for a given period, as, for instance, from the first of January to the first of February, will include or exclude the first day of each of these months. Grotius is of opinion, that the first day of January would be excluded, and the whole of the first day of February included. Puffendorf, Heineccius, and Vattel, would include in the truce both the day of its commencement and the day of its termination. Rutherford can see no good reason why one day should be excluded and the other included. "One would rather think," he says, "that the first day is the limit of the truce at one end, as the last day is the limit of it at the other end; and, consequently, that there is the same reason for reckoning the first day that there is for reckoning the last day, as a part of the time which is included in the truce." The rule, however, proposed by the English commissioners in their report on the practice of the English courts in 1831, is to compute the first day exclusively, and the last day inclusively, in all cases. The general rules laid down by text-writers, respecting the interpretation and observance of truces and other compacts in war, are necessarily somewhat indefinite, and questions almost always arise in their application to particular cases; it is, therefore, important that stipulations should be inserted in such compacts specifying what may and what may not be done by each party, both within and without the limits of the place, in case of a siege, or of the immediate theatre of military operations, if it be between belligerent forces in the field. Moreover, if the cessation of hostilities is for a given period of time, in order to avoid all ambiguity, the time should be precisely stated, as from a certain hour of a certain day to a certain hour of another certain day; and if dates only are given, it should be stated whether or not either or both are included. (*Vattel, Droit des Gens*, liv. 3, ch. 16, §§ 244, 245; *Rutherford, Institutes*, b. 2, ch. 9, § 22; *Kent, Com. on Am. Law*, vol. 1, p. 160; *Bello, Derecho International*, pt. 2, cap. 9, § 2; *Heffter*,



*Droit International*, § 143; *Requielme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 13; *Real, Science du Gouvernement*, tome 5, ch. 3 sec. 2; *Grotius, De Jur. Bel. ac Pac.*, lib. 3, cap. 21, § 9; *Puffendorf, De Jure Nat. et Gent.*, lib. 8, cap. 7, § 8; *Heineccius, Elem. Juris.*, lib. 2, cap. 9, § 208; *Wildman, Int. Law*, vol. 1, p. 27.)

§ 9. As a truce, or armistice, merely suspends hostilities, they are renewed at its expiration without any new declaration or notice; for as every one is bound to know the effect of such termination, no public declaration is required. But if the truce was for an indefinite period of time, justice and good faith require due notice of intention by the party who terminates it. If, however, the conditions of the truce be broken by one belligerent, there is no doubt that the other may immediately resume hostilities without any declaration. It is sometimes stipulated in the truce, that the violator shall pay a certain penalty for the violation. In such case the penalty should be demanded before a return to war, and, if paid, the right of hostilities does not occur. A truce is not broken by the acts of private persons, unless they are *ordered* or *ratified* by public authority. But, unless the private offenders are punished or surrendered, and unless the thing siezed is restored, or compensated for, it is legally *presumed* that the act of the private offender was duly ordered or ratified. This is the rule of public law. (*Kent, Com. on Am. Law*, vol. 1, p. 161; *Rutherford, Institutes*, b. 2, ch. 9, § 22; *Vattel, Droit des Gens*, liv. 3, ch. 16, § 260; *Wheaton, Elem. Int. Law*, pt. 4, ch. 2, § 23; *Puffendorf, de Jure Nat. et Gent.*, lib. 8, cap. 7, §§ 6-8; *Grotius, De Jur. Bel. ac Pac.*, liv. 3, cap. 21, §§ 10-13; *Phillimore, On Int. Law*, vol. 3, §§ 119, 121; *Wheaton, Hist. Law of Nations*, pp. 20-25; *Wildman, Int. Law*, vol. 1, p. 28; *Bello, Derecho Internacional*, pt. 2, cap. 9, § 2; *Heffter, Droit International*, § 142; *Burlamaqui, Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 11.)

§ 10. *Capitulations* are agreements entered into by a commanding officer for the surrender of his army, or by the governor of a town, or a fortress, or particular district of country, to surrender it into the hands of the enemy. Capitulations usually contain stipulations with respect to the inhabitants of the place which is surrendered, the security of their

religion, property, privileges and franchises, and also with respect to the troops or garrison, either allowing them to march out with their arms and baggage, with the honors of war, or requiring them to lay down their arms and surrender as prisoners of war. The general phrase "with all the honors of war," is usually construed to include the right to march with colors displayed, drums beating, etc. It is proper, however, that such matters should be precisely stated in the articles of capitulation. The authority to make capitulations falls within the scope of the general powers of the chief commander of the military or naval forces, or of the town, fortress, or district of country included in the capitulation. The power of the general or admiral to enter into an ordinary capitulation, the same as in the case of a truce, is necessarily implied in his office. So, of the chief officer of a town, fortress, or district of country. "The governor of a town," says Rutherford, "is the commander of the garrison, that is, of an army employed for the particular purpose of defending the town. The nature, therefore, of his trust implies, that his compacts about surrendering the town, will bind himself and the garrison. If he surrenders it when he might have defended it, or upon worse terms than he might have made, he is accountable to his own state for his misconduct; but the abuse of his power does not affect any compact which he makes, in consequence of that power." But if unusual and extraordinary stipulations are inserted in the capitulation which are not within the ordinary and implied powers of the officer making it, they are not binding either upon the state or upon the troops. For example, if the general should stipulate that his troops shall never bear arms against the same enemy, or, if the governor of a place should agree to cede it to the enemy as a conquest, such agreements, not coming within his implied powers, would be null and void, unless special authority to that effect had been given to him, or his acts should subsequently receive the sanction of his government. (*Wheaton, Elem. Int. Law*, pt. 4, ch. 2, § 24; *Vattel, Droit des Gens*, liv. 3, ch. 16, §§ 287, 288; *Rutherford, Institutes*, b. 2, ch. 9, § 21; *Grotius, de Jur. Bel. ac Pac.*, lib. 3, cap. 22, §§ 6-8; *Martens, Precis du Droit des Gens*, §§ 291, 295; *Bello, Derecho Internacional*, pt. 2, cap. 9, § 3; *Riquetme*,

*Derecho Pub. Int.*, lib. 1, tit. 1, cap. 13; *Burlamaqui, Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 12; *Phillimore, On Int. Law*, vol. 3, § 122; *Wildman, Int. Law*, vol. 2, p. 27; *La Gloire*, 5 Rob. Rep., p. 197; *Martens, Précis du Droit des Gens*, § 291; *Ompléda, Litteratur, etc.*, t. 2, p. 648; *Moser, Versuch, etc.*, t. 9, pt. 1, pp. 157, 176; *Heffter, Droit International*, § 142.)

§ 11. Small detached parties or individuals, whether belonging to the military service or not, who happen to fall in with the enemy in a place distant from succor or any superior officer, are left to their own discretion and may, so far as concerns their own persons, do everything which a commander might do with respect to himself and the troops under his command. Promises made by individuals under such circumstances, if confined to their own persons and within the sphere of a private individual, are valid and binding, and the sovereign has no right to release them from their obligations, or compel them to violate the compact. For, when a subject can neither receive his sovereign's orders, nor enjoy his protection, he resumes his natural rights, and may provide for his safety by any just and honorable means in his power. Individual promises of this kind, made with competent powers, are of as binding a nature as truces and capitulations, and the good of the state equally requires that faith be kept on such occasions as in more formal agreements. Thus, a prisoner who is released on parole, is bound to observe it with scrupulous punctuality, nor can the sovereign oppose such observance of his engagement. But, if a soldier should be made prisoner in the vicinity of his commander and while under his immediate orders, he is not properly the master of his own acts or left to his own discretion, and, under ordinary circumstances, he should wait as prisoner of war, till his superiors can treat for his exchange or release. But if he fall into the hands of a barbarous enemy, and, to avoid a cruel imprisonment, or to save his life, he promises a ransom or services not treasonable, his agreement should be respected by his superiors. (*Vattel, Droit des Gens*, liv. 3, ch. 16, § 264; *Grotius, de Jur. Bel. ac Pac.*, lib. 3, cap. 23; *Puffendorf, de Jur. Nat. et Gent*, lib. 8, cap. 7, § 16; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 13; *Burlamaqui, Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 13.)

§ 12. A *passport* or *safe conduct*, is a document granting to persons or property an exemption from the operations of war, for the time, and to the extent prescribed in the instrument itself. The term passport is applied to personal permissions given on ordinary occasions, both in peace and war, where there is no reason why the parties named in them should not go where they please; while safe conduct is the name usually given to the instrument which authorizes an enemy, or an alien, to go into places where he could not go without danger, or to carry on trade forbidden by the laws of war. The word passport, however, is more generally applied to persons, and safe conduct, to both persons and things. A passport is not transferable by the person named in the permission, for although there were no objections to giving the privilege to him, there might be very serious objections to the individual taking his place. It, however, generally includes the servants and personal baggage of the person to whom it is granted, unless there should be particular objection to the passage of such servants, or to the admission of the baggage; but, to save all doubt and difficulty in such matters, it is usual to enumerate with precision every particular with respect to the extent of the indulgence. A safe conduct for effects, without designating the person who is to introduce or remove them, may be introduced or removed by any agent of the owner, unless the agent selected should be personally objected to, as an object of suspicion or danger. Instruments of this kind, are always to be taken strictly, and must be confined to the persons, effects, purpose, place and time, for which they are granted. But, if the person who has received a passport should be detained in an enemy's country by sickness or by force, beyond the specified time, he should receive a new instrument, or be considered as still under the protection of the old one. But no detention by business, or by circumstances not entirely unavoidable, will entitle him to such indulgence. If, for example, he should take advantage of a suspension of hostilities to remain, he will do so at his peril, and if he should be found in an enemy's country at the termination of the truce, the time named in his passport having expired, he will be subject to the ordinary laws of war, without any claim for special protection. Passports and safe

conducts are of two kinds; those which are limited in their effects to particular places or districts of country, and those which are general and extend over a whole country. Those of the first class may be granted by military and naval officers or governors of towns, to have effect within the limits of their respective commands, and such instruments must be respected by all persons under their authority. The power to issue such documents is implied in the nature of their trust. But a general passport, or safe conduct, to extend over the whole country, must proceed from the supreme authority of the state, either directly or by an agent duly empowered to issue it. (*Vattel, Droit des Gens*, liv. 3, ch. 17, §§ 265–270; *Rutherford, Institutes*, b. 2, ch. 9, § 22; *Kent, Com. on Am. Law*, vol. 1, pp. 162, 163; *Wheaton, Elem. Int. Law*, pt. 4, ch. 2, § 25; *Grotius, de Jur. Bel. ac Pac.*, lib. 3, cap. 2, §§ 14–22; *Phillimore, On Int. Law*, vol. 3, § 101; *Puffendorf, de Jur. Nat. et Gent.*, lib. 8, cap. 7, § 13; *Wildman, Int. Law*, vol. 2, pp. 28, 29; *Rayneval, Inst. du Droit Nat. etc.*, liv. 3, ch. 9; *Bello, Derecho Internacional*, pt. 2, cap. 9, § 4; *Heffter, Droit International*, § 142; *Burlamaqui, Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 11; *Real, Science du Gouvernement*, tome 5, ch. 3, sec. 4; *Moser, Versuch, etc.*, b. 10, p. 452.)

§ 13. A passport, or safe conduct, may, for good reasons, be revoked by the authority which granted it; on the general principle of the law of nations, that privileges may always be revoked, when they become detrimental to the state. A permission granted by an officer may, for this reason, be revoked by his superior, but, until so revoked, it is as binding upon the successor as upon the party who issued it. The reasons for such revocation need not always be given; but permissions of this kind can never be used as snares to get persons or effects into our power, and then, by a revocation, hold the persons as prisoners, or confiscate the property. Such conduct would be perfidy toward an enemy, and contrary to the laws of war. (*Vattel, Droit des Gens*, liv. 3, ch. 17, § 276; *Kent, Com. on Am. Law*, vol. 1, p. 163; *Grotius, de Jur. Bel. ac Pac.*, lib. 3, cap. 21, § 22; *Phillimore, On Int. Law*, vol. 3, § 101; *Garden, De Diplomatie*, liv. 6, § 16; *Bello, Derecho Internacional*, pt. 2, cap. 9, § 4; *Burlamaqui, Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 11.)

§ 14. Any violation of the good faith and spirit of such instruments, entitles the injured party to indemnity against all injurious consequences. Persons violating these instruments are also subject to punishment by the municipal laws of the state by which they are issued. Section twenty-eight of the act of congress, approved April 30th, 1790, provides that if any person shall violate any safe conduct or passport, duly obtained and issued under the authority of the United States, such person so offending, on conviction, shall be imprisoned not exceeding three years, and fined at the discretion of the court. If a soldier or subordinate officer should violate a passport, or safe conduct, issued by his superior, he would, probably, also be subject to be punished for the military offense under military law by a court martial. (*Kent, Com. on Am. Law*, vol. 1, p. 163; *Vattel, Droit des Gens*, liv. 3, ch. 17, § 276; *U. S. Statutes at Large*, vol. 1, p. 118; *Garden, De Diplomatie*, liv. 6, § 16; *Dunlop, Digest of Laws of the U. S.*, p. 72; *Brightly, Digest of Laws of the U. S.*, p. 41.)

§ 15. *Safe-guards* are protections granted by a general or other officer commanding belligerent forces, for persons or property within the limits of their commands, and against the operations of their own troops. Sometimes they are delivered to the parties whose persons or property are to be protected; at others they are posted upon the property itself, as upon a church, museum, library, public office, or private dwelling. They are particularly useful in the assault of a place, or immediately after its capture, or after the termination of a battle, to protect the persons and property of friends from destruction by an excited soldiery. Violations of such instruments are usually punished with the utmost severity. A guard of men is sometimes detached to enforce the safety of the persons and property thus protected. Such guards are justified in resorting to the severest measures to punish any violation of the safety of their trust. Article fifty-five of the rules and articles of war of the United States, approved April 10th, 1806, provides that, "whosoever, belonging to the armies of the United States employed in foreign parts, shall force a *safe-guard*, shall suffer death." A *safe-guard* is a particular kind of passport or safe-conduct, and is to be construed according to the rules of interpretation applicable to

such instruments. (*Garden, De Diplomatie*, liv. 6, § 16; *Martens, Precis du Droit des Gens*, § 292; *Phillimore, On Int. Law*, vol. 2, pp. 28, 29; *U. S. Statutes at Large*, vol. 2, p. 366; *U. S. Army Regulations of 1857*, §§ 769-773; *Rayneval, Inst. du Droit Nat.*, etc., liv. 3, ch. 9; *Heffter, Droit International*, § 142; *Real, Science du Gouvernement*, tome 5, ch. 3, sec. 4; *Brightly, Digest of Laws of U. S.*, p. 78; *Dunlop, Digest of Laws of U. S.*, p. 381.)

§ 16. A *cartel* is an agreement between belligerents for the exchange or ransom of prisoners of war. The actual existence of a war is not essentially necessary to give effect to cartels, but it is sufficient if they entered into prospectively and in expectation of approaching hostilities; for the occasions for them may just as naturally arise from a view of approaching events, and parties may contract to guard against the consequences of hostilities which they may foresee. Both belligerents are bound to faithfully observe such compacts, and a cartel party sent under a flag of truce to carry into execution the provisions of a cartel, is equally under the protection of both. "Good faith and humanity," says Wheaton, "ought to preside over the execution of these compacts, which are designed to mitigate the evils of war, without defeating its legitimate purposes. By the modern usages of nations, commissaries are permitted to reside in the respective belligerent countries, to negotiate and carry into effect the arrangements necessary for this object. Breach of good faith in these transactions can be punished only by withholding from the party guilty of such violation the advantages stipulated by the cartel; or, in cases which may be supposed to warrant such a resort, by reprisals or vindictive retaliation." In the United States such compacts are not deemed treaties in the sense of the constitution. A cartel for the exchange of prisoners, between the United States and Great Britain, in 1813, was ratified by the American secretary of state (May 14th.) (*Wildman, Int. Law*, vol. 2, p. 31; *Vattel, Droit des Gens*, liv. 3, ch. 17, § 278; *Rutherford, Institutes*, b. 2, ch. 9, § 22; *Wheaton, Elem. Int. Law*, pt. 4, ch. 2, § 3; *Phillimore, On Int. Law*, vol. 3, § 111; *The Carolina*, 6 Rob. Rep., p. 336; *La Gloire*, 5 Rob. Rep., p. 492; *The Mary*, 5 Rob. Rep., p. 200; *Manning, Law of*

*Nations*, p. 163; *Martens, Precis du Droit des Gens*, § 275; *Garden, De Diplomatie*, liv. 6, § 16; *Bello, Derecho Internacional*, pt. 2, cap. 9, § 5; *Heffter, Droit International*, § 142.)

§ 17. *A cartel ship*, is a vessel commissioned for the exchange or ransom of prisoners of war, or to carry proposals from one belligerent to the other, under a flag of truce. Such commission and flag are considered to throw over the vessel, and the persons engaged in her navigation, the mantle of peace; she is, *pro hoc vice*, a neutral licensed vessel, and her crew are also neutrals; and so far as relates to the particular service in which she is employed, she is under the protection of both belligerents. But she can carry no cargo, and no ammunition or implements of war, except a single gun for firing signals. This is regarded as a species of navigation which, on every consideration of humanity and policy, should be conducted with the strictest regard to the original purpose, and to the rules which are built upon it, since, if this mode of intercourse be broken off, it will be followed by calamitous results to individuals of both belligerents. It is, therefore, said by high authority, that cartel ships cannot be too narrowly watched; and that both parties should take care that the service should be conducted in such a manner as not to become a subject of jealousy and distrust between the two nations. The authority to commission a cartel ship, is supposed to emanate from the supreme power of the state, but it may be issued by a subordinate officer, in the due execution of a public duty. When a cartel ship appears to have been employed in the public service, and for the purposes of humanity, it will be presumed that the commission under which she acts was issued by the sanction of the councils of the state, until renounced by the sovereignty from which it is supposed to emanate. Thus, a cartel, granted by the commander of the British forces, at Amboyna, to a Dutch vessel, was held by Sir William Scott to be valid for the protection of the vessel from capture and condemnation. (*Philimore, On Int. Law*, vol. 3, § 111; *Duer, On Insurance*, vol. 1, pp. 539, 540; *The Carolina*, 6 Rob. Rep., p. 336; *The Venus*, 4 Rob. Rep., p. 355; *La Gloire*, 5 Rob. Rep., p. 192; *Wildman, Int. Law*, vol. 1, pp. 32, 33; *Grotius, De Jur. Bel. ac Pac.*, lib. 3, cap. 22, §§ 2, 4; *Puffendorf, De Jur. Nat. et Gent.*, lib. 8, cap. 7, § 13; *Vattel, Droit des Gens*, liv. 3, ch. 16, § 237.)



§ 18. The rights, immunities and duties of cartel ships, have been matters of discussion and judicial decision in prize courts. Sir William Scott gave a very elaborate opinion on this subject, in the case of *The Daifjie*. With respect to the character of the ships employed in such service, he says it is generally immaterial whether they are merchant ships, or ships of war, but there may be extreme cases in which the nature of the ship might be material; "as, if a fire ship was to be sent on such service to Portsmouth or Plymouth, though she had prisoners on board, she would undoubtedly be an unwelcome visitor to a naval arsenal, and her particular character might fairly justify a refusal to admit her." He was also of opinion, that the cartel protected such ships, not only *in trajectu, adeundum et redeundum*, but also in going from one port to another to be fitted up and to take prisoners on board, although the passage of ships from one port to another of an enemy, is liable to suspicion. Moreover, that a vessel *going* to be employed as a cartel ship, is not protected, by mere intention, on her way, for the purpose of taking on herself that character when she arrives. When it is necessary to send to another port for vessels for such purpose, it is proper to apply to the enemy's commissary of prisoners for a pass or special safe conduct. The principal question to be decided in such cases, is that of intention; if the vessel is actually commissioned and employed as a cartel ship, if she is fitted out and conducts herself, in every respect, as a cartel ship, she is protected as such; but if she is acting fraudulently, she is liable to condemnation. Imprudence and negligence, do not constitute fraud. (*Phillimore, On Int. Law*, vol. 3, §§ 111, 112; *Duer, On Insurance*, vol. 1, p. 539; *The Daifjie*, 3 Rob. Rep., pp. 141-146; *La Gloire* 5 Rob. Rep., p. 192; *The Mary*, 5 Rob. Rep., p. 200; *The Venus*, 4 Rob. Rep., p. 355; *The Carolina*, 6 Rob. Rep., p. 336.)

§ 19. The present usage of civilized nations is, as already stated, to exchange prisoners of war, or to release them on their *parole*, or word of honor, not to serve against the captor again for a definite period, during the war, or till properly exchanged. But it was formerly the frequent practice for the state to leave to every prisoner, or at least during the war, the care of redeeming himself, and the captor had a lawful

right to demand a *ransom* for the release of his prisoners. This practice gave rise to certain rules with respect to the interpretation of the particular agreements of this kind. As the captor was held responsible for the treatment of his prisoner, he could not divest himself of this responsibility by transferring him to another; but, having agreed with his prisoner concerning the price of the ransom, he could transfer this right to a third party, for the agreement then becomes a perfect contract, binding upon both parties, and the right to receive the price may be transferred by the captor to whomsoever he pleases. If the prisoner should die before being set at liberty, although the price of the ransom should have been agreed upon, it was not held to be due from his heirs; but if he had obtained his liberty at the time of his death, good faith would require the payment of the price agreed upon. If he should be retaken by his own party after making the compact of ransom, but before its execution, it would not be due, because he was not set at liberty in virtue of the agreement. If he has concealed his rank and character when making the agreement as to the price of ransom, he is guilty of fraud, and on its discovery, the captor is justified in annulling it. If he has agreed to perform any particular act, if not inconsistent with his duty to his own state, as a consideration for his release, he is bound to perform it, and he is deserving of punishment for a neglect or refusal to fulfil his promise. At one time, the wealth to be amassed by the ransom of prisoners of war, was one of the great inducements to military service, and curious instances of the importance which was attached to this consideration, occur in history. Thus, when the Maid of Orleans was to be brought to her disgraceful trial, the advisers of the measure thought it right to pay her captors, whose property she had become, a sum equal to what it was supposed they might be able to make by her ransom. (*Phillimore, On Int. Law*, vol. 3, § 109; *Martens, Recueil de Traités*, tome 3, p. 361; *Manning, Law of Nations*, pp. 156, et seq.; *Wheaton, Elem. Int. Law*, pt. 4, ch. 2, § 3; *Vattel, Droit des Gens*, liv. 3, ch. 17, §§ 278–285; *Turner, Hist. of England*, vol. 3, p. 101; *Lingard, Hist. of England*, vol. 5, p. 118; *United States Statutes at Large*, vol. 3, pp. 351, 778; *Niles, Register*, vol. 2, p. 382; *Wildman, Int. Law*, vol.

2, p. 26; *Martens, Precis du Droit des Gens*, § 275; *Bello, Derecho Internacional*, pt. 2, cap. 9, § 5; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 18; *Dumont, Corps Diplomatique*, tome 7, p. 231.)

§ 20. The term *ransom* is now usually applied to property taking from an enemy in war, and surrendered or restored to the owner on the payment of, or agreement to pay, a specified sum of money, which is called *ransom money*. This term was formerly applied to the redemption of property captured on land, as well as on the high seas; but, by general use, it is now understood to apply to the agreement made between the commander of a captured vessel or cargo, and the captor, by which the latter permits the former to depart with his vessel, and gives him a safe-conduct, in consideration of a sum of money which the former, in his own name, and in the name of the owners of the vessel and cargo, promises to pay at a future time named. This contract is usually made in writing, in duplicate, one of which is kept by the captor, which is properly called the *ransom bill*, and the other by the captured vessel, which is its *safe-conduct*. The general law relating to the ransom of captured property, was fully and ably discussed by Story. (*Vide Maisonnaire v. Keeting*, 2 Gallis. Rep., p. 337; *Bouvier, Law Dic., verb. Ransom*; *Tomlin, Law Dic., verb. Ransom*; *Kent, Com. on Am. Law*, vol. 1, pp. 104–105; *Wheaton, Elem. Int. Law*, pt. 4, ch. 2, § 28; *Heffter, Droit International*, § 142; *Bello, Derecho Internacional*, pt. 2, cap. 5, § 9; *Miller v. Resolution*, 2 Dallas Rep., p. 15; *Azuni, Droit Maritime*, tome 2, ch. 4, art. 6; *Emerigon, Des Prises*, ch. 12, sec. 21; *Pothier, Droit de Prop.*, nos. 134–144; *Valin, Des Prises*, art. 19; *Phillimore, On Int. Law*, vol. 3, § 432.)

§ 21. The contract of ransom is considered in England as tending to relax the energy of war, by depriving cruisers of the chance of recapture, and several statutes in the reign of George III. absolutely prohibited to British subjects the privilege of ransom of property captured at sea, unless in a case of extreme necessity, to be judged of by the court of admiralty. "Other maritime nations," says Kent, "regard ransoms as binding, and to be classed among the few legitimate *commercias belli*. They have never been prohibited in

this country, and the act of congress of August 2d, 1813, interdicting the use of British licenses, or passes, did not apply to the contract of ransom." (*Kent, Com. on Am. Law*, vol. 1, p. 105; *Chitty, On Com. Law*, vol. 1, p. 428; *Azuni, Droit Maritime*, tome 2, ch. 4, art. 6; *Emerigon, des Assurances*, ch. 12, sec. 21; *Valin, des Prises*, art. 66, p. 149; *Goodrich v. Gordon*, 15 Johns. Rep., p. 6; *Girard v. Ware*, 1 Peters. C. C. Rep., p. 142; *The Saratoga*, 2 Gallis. Rep., p. 164; *Maisonnaire v. Keating*, 2 Gallis. Rep., p. 336; *Brooks v. Dorr*, 2 Mass. Rep., p. 39; *Spafford v. Dodge*, 14 Mass. Rep., p. 66; *Phillimore, On Int. Law*, vol. 3, § 432; *Bello, Derecho Internacional*, p. 2, cap. 5, § 9.)

§ 22. The general authority to capture, which is delegated by the belligerent state to its commissioned cruiser, involves the power to ransom captured property, unless prohibited by the law of the captor's own country. The contract made for the ransom of enemy's property taken at sea, is generally carried into effect by a safe conduct issued by the captor, permitting the captured vessel and cargo to proceed to a designated port, by a prescribed route and within a limited time, and such a document furnishes a complete legal protection against the cruisers of the same belligerent state, or its allies, during the period and within the terms prescribed in the safe conduct. "From the very nature of the connection between allies," says Kent, "their compacts with the common enemy must bind each other, when they tend to accomplish the objects of the alliance. If they did not, the ally would reap all the fruits of the compact, without being subject to the terms and conditions of it; and the enemy with whom the agreement was made would be exposed, in regard to the ally, to all the disadvantages of it, without participating in the stipulated benefits. Such an inequality of obligation is contrary to every principle of reason and justice." (*Kent, Com. on Am. Law*, vol. 1, p. 105; *Pothier, Droit de Propriété*, No. 184; *Miller v. Miller*, 2 Dallas Rep., p. 15; *Phillimore, On Int. Law*, vol. 3, § 110; *Bello, Derecho Internacional*, pt. 2, cap. 5, § 9; *De Cussy, Droit Maritime*, liv. 1, tit. 2, § 29.)

§ 23. As a general rule, the captor, by the safe conduct implied in a ransom-bill, simply guarantees the ransomed vessel against being interrupted in its course, or retaken by

other cruisers of its own nation or of its allies, but not against loss by the perils of the sea. There is no implied insurance in the ransom bill against such losses. If, therefore, the ransomed vessel should founder at sea, or be wrecked, and become a total loss, the contract is still binding, and the ransom bill payable to the captor. But it is sometimes specified in the contract of ransom, that the loss of the vessel by the perils of the sea shall discharge the captured party from the payment of the ransom; such a clause is restrained to the case of a total loss *on the high seas*, and is not extended to stranding, which might afford the master a temptation to fraudulently cast away his vessel, in order to save the most valuable part of his cargo, and avoid the payment of the ransom. (*Wheaton, Elem. Int. Law*, pt. 4, ch. 2, § 28; *Kent, Com. on Am. Law*, vol. 1, p. 106; *Pothier, Traité de Propriété*, No. 188; *Bello, Derecho Internacional*, pt. 2, cap. 5, § 9; *Phillimore, On Int. Law*, vol. 3, p. 110.)

§ 24. If the ransomed vessel should exceed the time, or deviate from the course, prescribed in the contract, she forfeits her safe-conduct, and is liable to recapture; and if retaken, the debtors of the ransom are discharged from their obligation, which is merged in the prize, and the amount is deducted from the net proceeds thereof and paid to the first captor, whilst the residue is paid to the second captor. But any variation from the course prescribed, or the time limited, by the contract, caused by the stress of weather, or unavoidable necessity, does not work a forfeiture of the safe-conduct. If the captor, after having ransomed an enemy's vessel, is himself taken by the enemy, together with the ransom bill of which he is the bearer, this ransom bill becomes a part of the capture made by the enemy; and the persons of the hostile nation, who were debtors of the ransom, are thereby discharged from their obligation under the ransom-bill. But questions relating to maritime captures and recaptures, will be more particularly considered in the chapter on the rights and duties of captors. (*Vide post*, chapter xxx.; *Wheaton, Elem. Int. Law*, pt. 4, ch. 2, § 28; *Kent, Com. on Am. Law*, vol. 1, p. 106; *Pothier, Traité de Propriété*, Nos. 189, 140; *Valin, Com. sur l'Ordon*, liv. 3, tit. 9, § 10; *Bello, Derecho Internacional*, pt. 2, cap. 5, § 9; *De Cussy, Droit Maritime*, liv. 1, tit. 3, § 29.)

§ 25. Sometimes a *hostage* is taken for the faithful performance of the contract on the part of the captured. The death or the recapture of the hostage, does not discharge the contract of ransom, unless there is an express stipulation to that effect; for the captor takes the hostage only as a collateral security, and the loss of such collateral security does not cancel the contract, or discharge the debtor from his obligation to pay the ransom. "The practice in France," says Kent, "when a French vessel has been ransomed, and a hostage given to the enemy, is for the officers of the admiralty to seize the vessel and her cargo, on her return to port, in order to compel the owners to pay the ransom debt, and relieve the hostage; and this is a course dictated by a prompt and liberal sense of justice." Vattel and others have given very minute rules in relation to hostages for prisoners. If a hostage be given in order to procure the liberty of a prisoner, and the prisoner die, the hostage should be set free; but if the hostage die, the prisoner is not thereby restored to his liberty. If, however, one prisoner has been substituted for another, the death of one releases the other. If a prisoner be released on condition of procuring the release of another, and that other dies before his liberty has been attained, it is said that the survivor is bound to return to his prison! No civilized nation would now impose such conditions. (*Vattel, Droit des Gens*, liv. 3, ch. 17, §§ 278–286; *Phillimore, On Int. Law*, vol. 3, § 109; *Kent, Com. on Am. Law*, vol. 1, p. 107; *Wheaton, Elem. Int. Law*, pt. 4, ch. 2, § 28; *Pothier, Traité de Propriété*, No. 144; *Martens, Presis du Droit des Gens*, § 296; *Bello, Derecho Internacional*, pt. 2, cap. 5, § 9, cap. 9, § 5.)

§ 26. Contracts of ransom, like all other agreements arising *jure belli*, and lawfully entered into between belligerents, suspend the character of enemy, so far as respects the parties to the contract? There can, therefore, be no just reason why the captor should not bring suit directly on the ransom bill. And such appears to be the practice in the maritime courts of the European continent. The English courts, however, have decided that the subject of an enemy is not permitted to sue in the British courts of justice, in his own proper person, for the payment of a ransom, on the technical objection of the want of a *persona standi in judicio*, but that the pay-

ment could be forced by an action brought by the imprisoned hostage in the courts of his own country for the recovery of his freedom. This technical objection is not based on principle, nor supported by reason, and the decision has not the sanction of general usage. "The effect of this contract," says Wheaton, "like that of every other which may be lawfully entered into between belligerents, is to suspend the character of enemy, so far as respects the parties to the ransom bill; and, consequently, the technical objection of the want of a *persona standi in judicio* cannot, on principle, prevent a suit being brought by the captor directly on the ransom bill." Lord Mansfield considered this contract as worthy to be sustained by sound morality and good policy, and as governed by the law of nations and the eternal rules of justice. Licenses to trade, which properly belong to *commercium belli*, will be discussed in a separate chapter. (*Kent, Com. on Am. Law*, vol. 1, p. 107; *Wheaton, Elem. Int. Law*, pt. 4, ch. 2, § 28; *Anthon v. Fisher*, Doug. Rep., p. 649, note; *The Hoop*, 1 Rob. Rep., p. 169; *Cornu v. Blackburn*, 1 Doug. Rep., p. 641; *Ricard v. Bettenham*, 8 Burr. Rep., p. 1784; *Pothier, Traité de Propriété*, Nos. 136, 137; *Bello, Derecho Internacional*, pt. 2, cap. 5, § 9; *De Cussy, Droit Maritime*, liv. 1, tit. 3, § 29.)

§ 27. As flags of truce are sometimes sent from the enemy to forces in position, or on the march, or in action, nominally for making some convention, as for a suspension of arms, but really with the design of gaining information, it is proper that restrictions should be placed upon its use. Thus, if sent to an army in position, the bearer of said flag should never be allowed to pass the outer line of sentinels, nor even to approach within the range of their guns, without permission. If warned away, and he should not instantly depart, he may be fired on. Similar precautions may be taken by an army on the march. If the flag proceeds from the enemy's lines during a battle, the ranks which it leaves must halt and cease their fire. When the bearer displays his flag, he will be signalled by the opposing force, either to advance, or to retire; if the former, the forces he approaches will cease firing; if the latter, he must instantly retire; for, if he should not, he may be fired upon. (*Scott, Military Dic.*, p. 304.)

## CHAPTER XXVIII.

### LICENSES TO TRADE.

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§ 1. A *license* is a kind of safe conduct, granted by a belligerent state to its own subjects, to those of its enemy, or to neutrals, to carry on a trade which is interdicted by the laws of war, and it operates as a dispensation from the penalties of those laws, with respect to the state granting it, and so far as its terms can be fairly construed to extend. The officers and tribunals of the state under whose authority they are issued, are bound to respect such documents as lawful relaxations



of the ordinary state of war; but the adverse belligerent may justly consider them as *per se* a ground of capture and confiscation. Licenses are necessarily *stricti juris*, and cannot be carried beyond the evident intention of those by whom they are granted; nevertheless, they are not construed with pedantic accuracy, nor will their fair effect be vitiated by every slight deviation from their terms and conditions. Much, however, will depend upon the nature of the terms which are not complied with. Thus, a variation in the *quality* or *character* of the goods will often lead to more dangerous consequences than an excess of *quantity*. Again, a license to trade, though safe in the hands of one person, might become dangerous in those of another; so, also, with respect to the limitations of *time* and *place* specified in a license. Such restrictions are often of material importance, and cannot be deviated from with safety. (*Manning, Law of Nations*, p. 123; *Wheaton, Elem. Int. Law*, pt. 4, ch. 2, § 26; *Kent, Com. on Am. Law*, vol. 1, pp. 163, 164; *Grotius, de Jur. Bel. ac Pac.*, lib. 3, cap. 21, § 14; *Duer, On Insurance*, vol. 1, p. 595-619; *The Abigail*, Stewart Vice Ad. Rep., p. 360; *The Cosmopolite*, 4 Rob. Rep., p. 8; *The Twee Gebroeders*, 1 Edw. Rep., p. 96; *Schroeder v. Vaux*, 15 East. Rep., p. 52; *The Jorge Johannes*, 4 Rob. Rep., p. 263; *Pistoye et Duverdy, Traité des Prises*, tit. 6, ch. 2, sec. 6.)

§ 2. A *general license* is a suspension or relaxation of the exercise of the rights of war, generally or partially, in relation to any community or individuals, liable to be affected by their operation. It must emanate from the sovereignty of the state, for the supreme authority alone is competent to decide what considerations of political or commercial expediency will justify a suspension or relaxation of its belligerent rights. That branch of the government, to which, from the form of its constitution, the power of declaring or making war is entrusted, has an undoubted right to regulate and modify, in its discretion, the hostilities which it sanctions. This may be done by a general ordinance, by instructions to armed vessels, or by licenses issued to certain communities or individuals exempting them from capture. In England, licenses are either granted directly by the crown, or by some subordinate officer, to whom the authority of the

crown has been delegated, either by special instructions or under the provisions of an act of parliament. In the United States, as a general rule, licenses are issued under the authority of an act of congress, but in special cases, and for purposes immediately connected with the prosecution of a war, they may be granted by the authority of the president, as commander-in-chief of the military and naval forces of the United States. (*Wildman, Int. Law*, vol. 2, pp. 245, 255; *Duer, On Insurance*, vol. 1, pp. 355, 541, 594-619; *Vandyke v. Whitmore*, 1 East. Rep., p. 475; *Taulman v. Anderson*, 1 Taunt. Rep., p. 227; *Shiffner v. Gordon*, 12 East. Rep., p. 296; *The Cosmopolite*, 4 Rob. Rep., p. 11; *The Hope*, 1 Dod. Rep., p. 226; *The Charlotte*, 1 Dod. Rep., p. 387.)

§ 3. For the same reasons, a *special license* to individuals for a particular voyage, or for the importation or exportation of particular goods, must, as a general rule, also emanate from the supreme authority of the state. But there are exceptions to this rule growing out of the particular circumstances of the war in particular places. The governor of a province, the general of an army, or the admiral of a fleet, may grant licenses to trade within the limits of their own commands, and such documents are binding upon them and upon all persons who are under their authority, but they afford no protection beyond the limits of the authority of those who issue them. Thus, in the war between the United States and the republic of Mexico, the governor of California and the commander of the Pacific squadron, issued such licenses, but it was not pretended that such protection extended beyond the limits of their respective commands. The peculiar circumstances of the case, the great distance from the seat of the supreme federal authority, the scarcity of provisions and supplies, and the want of American vessels on that coast, were deemed sufficient reasons for the exercise of that power. (*Wheaton, Elem. Int. Law*, pt. 4, ch. 2, § 27; *Wildman, Int. Law*, vol. 2, p. 247; *Duer, On Insurance*, vol. 1, p. 597; *The Hope*, 1 Dod. Rep., p. 226; *Letter of Sec'y of California*, 31st Cong., 1st sess. H. of R., Ex. Doc., No. 17, p. 671; *Cushing, Opinions U. S. Att'ys Gen'l*, vol. 6, p. 630.)

§ 4. Licenses have frequently been granted during the operations of a war, not only for the protection of an enemy trading in the country of a belligerent, but to authorize subjects to trade with the enemy; and the cases relative to their authority and legal effect, are numerous, both in the reports of courts of admiralty, and of common law. The leading case on this subject is that of *The Hope*, an American ship, laden with corn and flour, and captured whilst proceeding from the United States to the Spanish peninsula, under the protection of instruments granted by the English admiral on the Halifax station, and the British consul at Boston. In pronouncing judgment in that case, Sir William Scott remarked, that no consul in any country, particularly in an enemy's country, is vested with power, in virtue of his office, to exempt the property of enemies from the effects of hostilities; and that an admiral could restrain the ships under his immediate command from committing acts of hostility, but could grant no safe conduct of this kind beyond the limits of his own station. But such acts might be regarded as *sponsiones*, or agreements *sub spe rate*, to which a subsequent ratification, by the proper authority, would give validity. It was shown that these acts of its officers had been confirmed by an order in council, and a restitution of the property was decreed accordingly. But, in the case of *The Charles*, and other similar cases, where the safe conducts had been signed by the English admiral, and also by the Spanish minister in the United States, but not confirmed by the British government, it was decided that the licenses afforded no protection, being issued without proper authority. So, also, in cases of safe conducts granted by the British minister, in the United States, to American vessels sailing with provisions to the island of St. Bartholomew. All were condemned where the licenses were not expressly included within the terms of the confirmation by the order in council. (*The Cosmopolite*, 4 Rob. Rep., p. 11; *The Hope*, 1 Dod. Rep., p. 226; *Johnson v. Sutton*, Doug. Rep., p. 254; *Duer, On Insurance*, vol. 1, pp. 597, 598; *Wheaton, Elem. Int. Law*, pt. 4, ch. 2, § 27.)

§ 5. There are very few American decisions on the subject of licenses, and there is a great want of uniformity in those of the British admiralty. Mr. Duer has pointed out

and commented on the causes of this irregularity. Prior to the peace of Amiens, licenses were regarded as an act of special grace, and most strictly interpreted, but, on the renewal of the war, the issuing of licenses by England was regarded as a matter of national policy, rather than personal favor. The courts, in consideration of this policy, gave to these instruments the largest interpretation possible. "Most of the reported cases on the subject of licenses, were decided during the period that this liberal doctrine prevailed, and in many of them it is a matter of extreme difficulty to say, whether the determination was governed by the peculiar circumstances and character of the war, or by reasons of general and permanent application. It is evident, however, that it is only rules of a permanent character, that can be justly said to form a part of the existing law, and that it would be useless to state those that were, in truth, occasional exceptions, arising from a state of things so extraordinary, that it is highly improbable it will ever again occur." (*Hautefeuille, Des Nations Neutres*, tome 1, p. 19; *Duer, On Insurance*, vol. 1, pp. 594–596; *The Cosmopolite*, 4 Rob. Rep., p. 11; *The Goede Hoop*, 1 Edw. Rep., p. 328–331; *The Juno*, 2 Rob. Rep., p. 117; *Morgan v. Oswald*, 3 Taunt. Rep., p. 555; *Flindt v. Scott*, 5 Taunt. Rep., p. 693.)

§ 6. The validity of a license depends not only on the sufficiency of the authority by which it is granted, but also on the good faith of the party to whom it is issued. Like every other grant, although issued in due form, and by the proper authority, a license may be vitiated by fraudulent conduct in obtaining it. The misrepresentation or suppression of material facts—of facts that, if known, would probably have influenced the discretion of the grantor—renders the license a nullity, and exposes the property it is invoked to protect to certain condemnation. Nor is it necessary, in order to invalidate the license, that such misrepresentations or suppressions of material facts should, in all cases, involve an imputation or suspicion of fraud. Thus, where the agent who procured the license was described as a merchant of London, but it appeared on trial that, when the license was granted, he was, in fact, a resident of a foreign country, the error was held to invalidate the license. So, where a license was granted

to a person by name, describing him as a British merchant, and it was found that he, in person, visited Holland, at that time an enemy's country, mixed and incorporated himself, when there, in the national commerce, and exported the goods as a Dutch merchant, instead of importing them as an English merchant, the license was regarded as invalidated, and his property confiscated. (*Wildman, Int. Law*, vol. 2, p. 250; *Duer, On Insurance*, vol. 1, pp. 594, 601, 602; *The Clío*, 6 Rob. Rep., p. 69; *The Cosmopolite*, 4 Rob. Rep., p. 11; *The Jonge Klassina*, 5 Rob. Rep., p. 269; *Klingender v. Bond*, 14 East. Rep., p. 484.)

§ 7. Although a license may have been issued by competent authority, and on the good faith of the party obtaining it, in order to render it available for the protection of the property to which it relates, the intentions of the grantor, as expressed in the license, must be pursued in its mode of execution, and there must be an entire good faith on the part of the user, in executing it. And although, as before remarked, licenses are not to be construed with a literal and pedantic accuracy, yet no greater latitude of interpretation is permitted than corresponds with the intentions of the grantor, fairly understood; no other or greater deviation is allowed, than it may be justly presumed the grantor with a knowledge of the circumstances, would himself have sanctioned. "It is a mistake," says Duer, "to suppose that the rights of the user may not be prejudiced by a construction of the grant that is merely erroneous. It is absolutely essential, that the will of the grantor shall be observed; so that, that only shall be done which he intended to permit; whatever he did not mean to permit is absolutely interdicted. Hence, the party who uses the license, engages, not only for fair intentions, but for an accurate interpretation and execution of the grant." (*Wildman, Int. Law*, vol. 2, pp. 245, et seq.; *Duer, On Insurance*, vol. 1, pp. 598, 599; *The Cosmopolite*, 4 Rob. Rep., p. 11; *The Jonge Johannes*, 4 Rob. Rep., p. 263; *The Vriendschap*, 4 Rob. Rep., p. 96.)

§ 8. The first material circumstance to be considered in the execution of a license, with respect to the intentions of the grantor and the good faith of the user, is, *the persons entitled to use it*. A license is not a subject of transfer or assignment,

and however general may be the terms in which the grantees are described, those who claim for their property its protection, must show that the application on which it was issued was made in their behalf, and that the applicant named in the license was, in truth, their agent. But if granted to a particular person by name, in behalf of himself and others, it is not necessary that the person named should have any share or interest in the property to which the license relates; it is sufficient if he acted as agent of those to whom its exclusive use is appropriated. If the license is, by express words, made negotiable, or if no mention whatever is made of the persons upon whose application it is granted, or by whom it is to be used, it is a legitimate subject of transfer and sale, and the purchaser is as fully protected as if it had been granted to him on his personal application. (*Duer, On Insurance*, vol. 1, pp. 599–606; *Feise v. Thompson*, 1 Taunt. Rep., p. 122; *Warin v. Scott*, 4 Taunt. Rep., p. 605; *Robinson v. Morris*, 5 Taunt. Rep., p. 725; *Bartlow v. M'Intosh*, 12 East. Rep., p. 311; *Busk v. Bell*, 16 East. Rep., p. 3; *Rawlinson v. Janson*, 12 East. Rep., p. 223; *The Jonge Johannes*, 4 Rob. Rep., p. 263; *The Acteon*, 2 Dod. Rep., p. 48; *The Louisa Charlotte*, 1 Dod. Rep., p. 308; *Fenton v. Pearson*, 15 East. Rep., p. 419; *Morgan v. Oswald*, 3 Taunton Rep., p. 555; *Flindt v. Scott*, 5 Taunton Rep., p. 674.)

§ 9. But where the license is not made negotiable, and the persons named in the license obtained it in their own names and not as the representatives and agents of others—the license being *for themselves, their agents, or holders of their bills of lading*—it cannot protect the property of others for whom the grantees act as agents, and in which they are not interested. Thus, a license to B. & S. and their agents, will not protect the property of others for whom B. & S. may see fit to act as agents. But where a license is issued to B. S. & Co., meaning under that denomination to include persons who had agreed to take part in the shipment made under such license, such persons are held to be protected. (*Wildman, Int. Law*, vol. 2, pp. 254, 255; *The Jonge Johannes*, 4 Rob. Rep., p. 263; *The Christina Sophia*, cited 4 Rob. Rep., p. 267; *Feize v. Waters*, 2 Taunton Rep., p. 248.)

§ 10. The *second* point to be considered, in determining upon the proper execution of a license, is, *the character of the vessel*. The national character of the ship, as described in the license, is, in most cases, a condition necessary to be fulfilled. Where the license directs the employment of a neutral vessel belonging to a particular nation, the substitution of a neutral ship of a different state, standing in the same political relations to the belligerent powers, would, probably, not be regarded as prejudicial. The same may be said of the employment of two ships, when the terms of the license refer only to one, if both vessels bear the same national character, and there be no variation in the quantity or quality of the goods described in the license. But, in both these changes, a good and satisfactory cause must be shown. If a neutral ship is mentioned in the license, the employment of a ship of the state issuing the license is considered an essential deviation, which will lead to a condemnation. So, the employment of a ship belonging to the enemy, when not authorized by the license, is, in all cases noxious and fatal. When the license authorizes the importation of goods from an enemy's country, in an enemy's ship, although confined, in terms, to the goods, by the just construction of law, it is extended to the vessel also. For the necessary effect of such a license is to legalize the voyage as described, in all its incidents, and hence the ship is just as much a legitimate object of protection as the cargo which is to be brought in it. (*Duer, On Insurance*, vol. 1, pp. 609, 612; *Kensington v. Inglis*, 9 East. Rep., p. 273; *The Dankbaarheid*, 1 Dod. Rep., p. 183; *The Vrouw Cornelia*, 1 Edw. Rep., p. 340; *The Jonge Arend*, 5 Rob. Rep., p. 14; *The Goede Hoffnung*, 1 Dod. Rep., p. 257; *The Bourse*, 1 Edw. Rep., p. 369; *The Jonge Clara*, 1 Edw. Rep., p. 371; *The Speculation*, 1 Edw. Rep., p. 344; *The Hoffnung*, 2 Rob. Rep., p. 162.)

§ 11. When the license authorizes the transportation of goods by any ship or ships except those under the flag of a particular nation, the exception refers to the *fact* of the nationality of the ship, and merely to the external signs. Although the vessel may be documented as belonging to, and actually bear the flag of, another state, if it be shown

that she really belonged to the excepted nation, she will not be protected by the license and the flag. The reason of this rule is, that vessels of the excepted nation might otherwise engage in the prohibited navigation, by substituting a foreign flag for their own. But the unauthorized employment of such excepted vessels is not permitted to effect the goods of shippers who were not privy to the deception, or cognisant of the fact. Where there is no ground for imputing to them a voluntary departure from the conditions of the license in this respect, their property, if embraced by its terms, retains its protection. The vessel itself is condemned. (*Duer, On Insurance*, vol. 1, p. 611; *Wildman, Int. Law*, vol. 2, p. 253; *The Bourse*, 1 Edw. Rep., p. 370; *The Jonge Clara*, 1 Edw. Rep., p. 371; *The Dankbaarheid*, 1 Dod. Rep., p. 183.)

§ 12. Again, if the vessel was, in fact, not of the excepted nation when she sailed, but became so during the voyage, by some unexpected change of circumstances, as the conquest or annexation of the country to which she belongs, by the excepted state, such change of political relations will not deprive her of the protection of the license, where the parties have acted fairly under it. Thus, where the license was for a ship bearing any other flag than that of France, and the owners had become French subjects during the voyage by the sudden annexation to France of the port and territory in which they resided, it was held by Sir Wm. Scott, that the ship continued under the protection of the license, notwithstanding this change of national character. (*Wildman, Int. Law*, vol. 2, p. 253; *Duer, On Insurance*, vol. 1, pp. 611, 612; *The Jonge Clara*, Edw. Rep., p. 371.)

§ 13. A license to a vessel to import a particular cargo, is held to protect a vessel, in ballast, on her way to the port of lading, for the express purpose specified in the license. So, also, a license to export a cargo to an enemy's port, covers the ship, in ballast, on her return. In each of these cases the voyage to which the license is extended by implication, has a necessary connection with that to which it expressly relates. But the protection extends no further than is necessarily implied in the license; the taking of any part of a cargo on board in the outward voyage in the case of importation, or in the return voyage in the case of exportation,



subjects both ship and goods to confiscation. (*Duer, On Insurance*, vol. 1, p. 614; *Wildman, Int. Law*, vol. 2, p. 252; *The Cornelia*, Edw. Rep. 360; *Le Cheminant v. Pearson*, 4 Taunt. Rep., p. 367; *The Freindschaft*, Dod. Rep., p. 316.)

§ 14. The third point to be considered in the execution of a license is, *the quality and quantity of goods it protects*. A small excess in quantity, or the partial substitution of those of a different quality, if free from the imputation of concealment or fraud, will not absolutely vitiate the license, under the color of which they were introduced. The goods not protected by it are condemned, while those which it is admitted to embrace, are restored. If the excess in quantity be very small, and not attributable to design, it is intimated by Sir William Scott, that it would not be regarded as an essential deviation; but any change in the quality of the goods, cannot be justified or excused, and the articles not protected by the license are condemned. The fraudulent application of a license to cover or conceal goods not intended by the grantor, renders it wholly void, and exposes to confiscation even the goods that are embraced in its terms. Thus, where a vessel was licensed to proceed only with a cargo of corn on the voyage described, and a quantity of fire arms was stowed under the cargo for concealment, both ship and cargo were condemned. (¶ *Wildman, Int. Law*, vol. 2, pp. 256, 257; *Duer, On Insurance*, vol. 1, pp. 606, 617; *The Cosmopolite*, 4 Rob. Rep., pp. 11-18; *The Jonge Clara*, 1 Edw. Rep., p. 371; *The Juffrow Catharina*, 5 Rob. Rep., p. 141; *The Nicoline*, 1 Edw. Rep., p. 363; *The Vriendschap*, 4 Rob. Rep., p. 96; *The Goede Hoop*, Edw. Rep., p. 336; *The Catharina Maria*, Edw. Rep., p. 337; *The Wolfarth*, 1 Edw. Rep., p. 365; *The Seyerstadt*, 1 Dod. Rep., p. 241; *Kier v. Andrade*, 6 Taunt. Rep., p. 498.)

§ 15. It was at one time held, that express words were necessary to protect the property of an *enemy*; but it was finally decided by the court of exchequer chamber, that a license containing the words, "to whomsoever the property may appear to belong," included goods shipped on account of enemy's subjects. But Mr. Duer expresses a doubt whether this last decision was not to be referred to the peculiar circumstances of the war, and to be regarded as the

fruits of the extreme liberality of construction which prevailed in England at that particular time. (*Duer, On Insurance*, vol. 1, pp. 604, 605; *Wildman, Int. Law*, vol. 2, p. 255; *The Cousine Marianne*, 1 Edw. Rep., p. 346; *The Hoffnung*, 2 Rob. Rep., p. 162; *The Beurse Van Koningsberg*, 2 Rob. Rep., p. 169; *Flindt v. Scott*, 5 Taunt. Rep., p. 674; 15 East. Rep., p. 525; *Mennett v. Bonham*, 15 East. Rep., p. 477; *Usparicha v. Noble*, 13 East. Rep., 332; *Foyle v. Bourdillon*, 3 Taunt. Rep., p. 546; *Morgan v. Oswald*, 3 Taunt. Rep., p. 555; *Feise v. Bell*, 4 Taunt. Rep., p. 478; *Anthony v. Moline*, 5 Taunt. Rep., p. 711; *Schnakoneg v. Andrews*, 5 Taunt. Rep., p. 716; *Robinson v. Touray*, 1 Maule and Selw. Rep., p. 217; *Hullman v. Whitmore*, 3 Maule and Selw. Rep., p. 337.)

§ 16. A license to an alien enemy, removes all his personal disabilities, so far as is necessary for his protection in the particular trade which is rendered lawful by the operation of the license. In respect to the voyage and trade which the license is intended to authorize and cover, he is not to be regarded as an enemy, but has all the legal privileges of a subject. So far as that particular voyage, trade, or cargo is concerned, he has a *persona standi* in all the courts, and may maintain suits in his own name, the same as a subject. (*Duer, On Insurance*, vol. 1, p. 606; *Morgan v. Oswald*, 3 Taunt. Rep., p. 555; *Usparicha v. Noble*, 13 East. Rep., p. 332; *Flindt v. Scott*, 5 Taunt. Rep., p. 674; 15 East. Rep., p. 525; *Fenton v. Pearson*, 15 East. Rep., p. 419.)

§ 17. The protection of a license is not limited, in all cases, to the cargo originally shipped; for if the original cargo should be accidentally injured or spoiled, it may be replaced by a second one, *precisely corresponding* with that described in the license. A license, says Wildman, was granted to a neutral vessel to import a specified cargo from Amsterdam; the ship having taken on board her cargo, sailed from Amsterdam, but was obliged to put into Medemblick, which bears the same relative situation to Amsterdam that Gravesend does to London. At Medemblick it was necessary to unload the cargo, which was found to be so much damaged that it was not fit to be put on board again. The old cargo was therefore sold, and a new one of the same identical nature with the first, corresponding with it both in substance

and quality, was put on board. "It was held that, under these circumstances, the parties were not deprived of the protection of the license. The case would have been widely different, if goods of a different description had been taken instead of the original cargo. Here the original purpose was pursued; no new speculation was originated, nor was there any change, except such as was produced by time, and unavoidable accidents. (*Duer, On Insurance*, vol. 1, p. 607; *Wildman, Int. Law*, vol. 2, p. 258; *The Wolfarth*, 1 Dod. Rep., p. 305; *Siffkin v. Glover*, 4 Taunt. Rep., p. 717.)

§ 18. A license to export goods to an enemy's port, although limited in terms to the outward voyage, is sufficient to protect both ship and cargo on the return, if the delivery of the goods at the port of destination was prevented by some inevitable accident, as a blockade, or a reasonable apprehension of seizure. But to entitle himself to the benefit of this liberal construction, the claimant must prove that the goods brought back are the identical goods exported under the license. (*Duer, On Insurance*, vol. 1, p. 607; *The Jonge Frederick*, 1 Edw. Rep., p. 357.)

§ 19. It is never admitted as a valid excuse for receiving on board goods not permitted in the license, that compulsion had been used by the hostile government, and that they were received only to avoid the seizure of the vessel. If such an excuse were admitted, it would open the door to fraud and collusion, as it would be difficult, if not impossible, to discover whether such a transaction, taking place in an enemy's port, was voluntary or not. (*Duer, On Insurance*, vol. 1, p. 608; *Wildman, Int. Law*, vol. 2, p. 256; *The Catharina Maria*, Edw. Rep., p. 337; *The Seyerstadt*, 1 Dod. Rep., p. 241.)

§ 20. Where a license is given expressly for *importation*, it is held that it can be used for that purpose only, and not for reexportation. Although the application should be made for a license to import, for the particular and special purpose of reexportation, the permission to import would extend no further than was expressed in the instrument itself. So, also, a license to import for the purpose of exportation, with condition of putting cargo in government warehouses, as security for reexportation, must be strictly complied with. Such a

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license does not cover importations for sale. (*Wildman, Int. Law*, vol. 2, p. 257; *The Vrouw Deborah*, 1 Dod. Rep., pp. 160, et seq.)

§ 21. The *fourth* point to be considered, in determining the due execution of the license, is, *the course and route of the voyage*. The requisitions of a license as to the port of shipment or delivery, of departure or destination, must be strictly followed. The same may be said, in general, with respect to the course of the voyage. If the license directs that the ship shall stop at a particular port for convoy, the neglect or omission to comply with the direction invalidates the license. The same result would follow the touching for orders at an interdicted port; but a deviation, for the same purpose, to a neutral or other port not forbidden, although not authorized, seems not to impair the legal effect of the license. Any deviation from the prescribed course of the voyage, if produced by stress of weather, or other unavoidable accident, does not invalidate the license; if the necessity is proved, it is deemed a valid excuse. (*Wildman, Int. Law*, vol. 2, p. 260; *Duer, On Insurance*, vol. 1, pp. 612–614; *The Europa*, 1 Edw. Rep., p. 341; *The Minerva*, 1 Edw. Rep., p. 375; *The Frau Magdalena*, 1 Edw. Rep., p. 367; *The Emma*, 1 Edw. Rep., p. 366; *The Hoppet*, 1 Edw. Rep., p. 369; *The Twee Gebroeders*, 1 Edw. Rep., p. 97; *The Manly*, 1 Dod. Rep., p. 357; *The Vrow Cornelia*, 1 Edw. Rep., p. 349; *The Byfield*, 1 Edw. Rep., p. 188.)

§ 22. An enemy's ship and cargo, belonging to the same owner, and licensed to go to Dublin, were taken going to Leith, a place not named in the license, and to be reached by a course totally different from that indicated; both ship and cargo were condemned. The party not being within the terms of the license, the character of enemy revives, and the property, thus become hostile, is subject to the ordinary rule of confiscation. (*Wildman, Int. Law*, vol. 2, p. 260; *The Manly*, 1 Dod. Rep., p. 257; *The Europa*, Edw. Rep., p. 342; *The Edel Catharina*, 1 Dod. Rep., p. 55; *Wainhouse v. Cowie*, 4 Taunt. Rep., p. 178.)

§ 23. An *intended* ulterior destination does not vitiate the protection of a license, if the parties keep within the terms

expressed and intended by the instrument. Thus, a vessel with a license to import a cargo into Leith from a port of the enemy, with an ulterior destination to Bergen. It was held that such ulterior destination did not vitiate the license for the voyage to Leith; but had the vessel been captured after completing the licensed part of the voyage, and on the way from Leith to Bergen, the license would have afforded her no protection. (*Wildman, Int. Law*, vol. 2, p. 263; *The Henrietta*, 1 Edw. Rep., p. 363.)

§ 24. The condition introduced in the license, that the vessel shall stop at a particular port for convoy, is regarded as fundamental, and the breach of it as fatal. The reason for introducing the condition is, that the vessel may be subject to inspection in that part of her navigation. In case where the admiral under whose direction the convoy is to be furnished orders, a deviation for the purpose of taking convoy at another place, the court felt itself bound to uphold the acts of the admiral. Such a deviation was placed on the same ground as that caused by stress of weather. (*Wildman, Int. Law*, vol. 2, p. 264; *The Europa*, Edw. Rep., p. 358; *The Minerva*, Edw. Rep., p. 375; *The Anna Maria*, 1 Dod. Rep., p. 209.)

§ 25. The effect of a deviation from the direct voyage described in the license, by touching at an intermediate port, depends in some degree upon the time of capture. If such vessel be seized on her way to such intermediate port, the presumption of law is, that she was going thither for the purpose of violating the license. But if taken after leaving the intermediate port, with the identical cargo which she carried in, and while actually proceeding for her lawful destination, the presumption of *mala fides* would be removed. Touching at an *interdicted* port, vitiates the license, unless expressly permitted in the license itself. (*Wildman, Int. Law*, vol. 2, p. 262; *The Europa*, 1 Edw. Rep., p. 342; *The Frau Magdalena*, 1 Edw. Rep., p. 367; *The Hoppet*, 1 Edw. Rep., p. 369; *The Emma*, 1 Edw. Rep., p. 379.)

§ 26. The *fifth* point to be considered is, *the time limited in the license*. There is a material distinction between the construction of a license for the exportation of goods to an ene-

my's port, and one for an importation merely. Where the license requires that the goods to which it relates, shall be exported on or before a certain day, a delay for a single day beyond that which is specified, renders the license wholly void. But not so with respect to importations. If the party having a license, be prevented from commencing the voyage, or be delayed in its prosecution by stress of weather, the acts of a hostile government, or other similar cause, over which he has no control, the time thus consumed, is not to be considered in computing the period that the government intended to allow. But if he takes upon himself, at his own discretion, to extend the period specified, he loses the protection to which he would otherwise have been entitled. (*Duer, On Insurance*, vol. 1, pp. 614-616; *The Cosmopolite*, 1 Rob. Rep., pp. 12, 13; *The Goede Hoop*, 1 Edw. Rep., 327; *The Vrouw Cornelis*, 1 Edw. Rep., p. 349; *The Johann Pieter*, 1 Edw. Rep., p. 349; *The Sarah Maria*, 1 Edw. Rep., p. 361; *The Diana*, 2 Act. Rep., p. 34; *The Æolus*, 1 Dod. Rep., p. 300; *Williams v. Marshall*, 6 Taunt. Rep., p. 390; *Tullock v. Boyd*, 7 Taunt. Rep., pp. 468, 472; *Freeland v. Walker*, 4 Taunt. Rep., p. 478; *Effurth v. Smith*, 5 Taunt. Rep., p. 329; *Siffken v. Glover*, 4 Taunt. Rep., p. 77; *Leevin v. Cormac*, 4 Taunt. Rep., p. 488; *Siffken v. Allnut*, 1 Maul and Sel., p. 39; *Groning v. Crockatt*, 3 Camp. Rep., p. 55.)

§ 27. A license does not act retrospectively, and cannot take away any interest which is vested by law in the captors. Thus, a vessel was captured on the 24th January, with an expired license on board. Another license was obtained, and its date carried back to January 20th. It was held by the court, that the vessel at the time of capture was not protected either by the license which had expired, or by that subsequently obtained. (*Duer, On Insurance*, vol. 1, pp. 618, 619; *Wildman, Int. Law*, vol. 2, p. 265; *The Vrouw Deborah*, 1 Dod. Rep., p. 160; *The St. Ivan*, Edw. Rep., p. 376; *The Edel Catharina*, 1 Dod. Rep., p. 45; *Henry v. Stanniforth*, 4 Camp. Rep., p. 270.)

§ 28. Moreover, a license, not on board at the time of capture, but afterwards endorsed for it by the shipper, is no protection. If the license is general in its terms, the mere fact of its being found on board is not sufficient, unless it has

been appropriated to such ship by an endorsement to that effect, or by some positive evidence that this application was intended by the parties entitled to its use. These rules are obviously necessary to prevent a misapplication of the license by persons not having a right to avail themselves of its protection. (*Duer, On Insurance*, vol. 1, p. 62; *Wildman, Int. Law*, vol. 2, p. 266; *The Speculation*, Edw. Rep., p. 344; *The Fortuna*, Edw. Rep., p. 236; *The Carl*, Edw. Rep., p. 339.)

§ 29. A license is vitiated and becomes a mere nullity by an alteration of its date. In this respect, licenses are governed by the same rules as other grants issued by the supreme power of the State; they are utterly vitiated by any fraudulent alteration, and any change is *prima facie* fraudulent. It may, however, be explained. (*Duer, On Insurance*, vol. 1, p. 618; *Wildman, Int. Law*, vol. 2, p. 266; *The Louise Charlotte*, 1 Dod. Rep., p. 308; *The Cosmopolite*, 4 Rob. Rep., p. 13; *The Aurora*, 4 Rob. Rep., p. 218; *The Diana*, 2 Act. Rep., p. 54.)

§ 30. A license to trade with a port of the enemy, does not serve as a protection for a breach of blockade, in case the port is blockaded; nor does it afford any protection for carrying goods contraband of war, enemy's despatches, or military persons, or for a resistance of the right of visitation and search; in fine, it can cover no act not expressly mentioned in the license or implied as a means necessary for its execution. (*Wildman, Int. Law*, vol. 2, p. 262; *The Nicoline*, 1 Edw. Rep., p. 364; *The Acteon*, 2 Dod. Rep., p. 54; *The Byfield*, 1 Edw. Rep., p. 190.)

## CHAPTER XXIX.

### DETERMINATION OF NATIONAL CHARACTER.

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§ 1. *National character* may be determined from origin, naturalization, domicil, residence, trade, or other circumstances. That which results from birth or parentage, follows the



individual wherever he may be, till it is changed in one of the modes established or recognized by law: such as expatriation, naturalization, domiciliation, etc. Native allegiance is a legal incident of birth, and is the implied fidelity and obedience due from every person to the political sovereignty under which he is born. This is a principle of universal law, and is sanctioned alike by international jurisprudence and by the municipal codes of all countries. How far, and in what manner, this primitive allegiance may be dissolved or transferred, are questions which, perhaps, belong rather to municipal than to general public law, for the international *status* of the individual may be determined, at least in many cases, without regard to his allegiance, whether native or acquired. In others, however, this question must be considered in connection with the right of expatriation and naturalization. It may be proper to remark in this place, that inasmuch as the national character, which results from origin, continues till legally changed, the *onus* of proving such change, usually rests upon the party alleging it. (*Westlake, Private International Law*, §§ 7, et seq.; *Foelix, Droit Int. Privé*, §§ 27-30; *Phillimore, On Int. Law*, vol. 1, §§ 315, et seq.; *Grotius, de Jur. Bel. ac. Pac.*, lib. 2, cap. 5, § 24.)

§ 2. It has already been remarked, that every independent state has, as one of the incidents of its sovereignty, the right of municipal legislation and jurisdiction over all persons within its territory, whether its own subjects or foreigners, commorant in the land. With respect to its own subjects, this right, it is claimed, includes not only the power to prohibit their egress from its territory, but also to recall them from other countries; and, with respect to commorant foreigners, not only to regulate their local obligations, but to confer upon them such privileges and immunities as it may deem proper. It may therefore change their nationality, by what is called *naturalization*. It is believed that every state in christendom accords to foreigners, with more or less restrictions, the right of naturalization, and that each has some positive law or mode of its own for naturalizing the native born subjects of other states, without reference to the consent of the latter for the release or transfer of the allegiance of such subjects. It seems, therefore, that, so far as the practice of nations is con-

cerned, the right of naturalization is universally claimed and exercised, without any regard to the municipal laws of the states whose subjects are so naturalized. It may also be remarked, that this right, as a general proposition, is admitted and affirmed by most writers of acknowledged authority on international law. From the generality and extent of this right of naturalization, it has been inferred that the right of expatriation is equally broad and comprehensive. And this inference is undoubtedly correct, so far as the rules of general public law are applicable; or, in other words, so far as they do not conflict with the proper exercise of the municipal power of particular states, within the limits of their own territory. But it is claimed that each state has the exclusive power to permit or deny the exercise of this right to its own citizens, within the orbit of its own jurisdiction. At any rate, this right of municipal legislation is exercised almost as generally as that of naturalization. (*Foelix, Droit International Privé*, §§ 27–55; *Phillimore, On Int. Law*, vol. 1, §§ 315, et seq.; *Cushing, Opinions U. S. Att'ys Gen'l*, vol. 8, pp. 125, et seq.; *Dou, Derecho Publico*, tomo 1, cap. 17; *Riquelme, Derecho Internacional*, tomo 1, p. 319; *Heffter, Droit International*, § 59; *Westlake, Private Int. Law*, §§ 20, et seq.; *Bello, Derecho Internacional*, pt. 2, cap. 5, § 1.)

§ 3. The laws of Great Britain permit the naturalization of foreigners without reference to their primitive allegiance, and without requiring any abjuration, by the new subjects, of their original sovereign or country. Formerly, an act of parliament was necessary in each particular case, but since 1844, aliens may be naturalized as British subjects by presenting a petition to one of the principal secretaries of state. In every country of continental Europe the executive branch of the government possesses the power of naturalization, subject, in some cases, to certain specified restrictions. A distinction, however, is generally made between the native and naturalized citizen with respect to political rights. By the constitution of the United States, congress have power to establish a uniform rule of naturalization, and this power is recognized by the supreme court as being exclusive of that of the individual states. The act of March 26th, 1790, prescribed the taking of an oath or affirmation to support the

constitution, but required no abjuration of former allegiance. The act of January 29th, 1795, required, among other things, a renunciation of all foreign allegiance, particularly to the prince or state of whom the applicant was a subject or citizen. There is much less uniformity in the municipal codes of different states with respect to denationalization. The English jurists and publicists almost unanimously deny the right of expatriation, to the extent of a change of primitive allegiance, without the consent of the liege lord. By the laws of France, a Frenchman loses his native character by naturalization in a foreign country, by accepting office under a foreign government without the permission of his own, or, by so establishing himself abroad as to show an intention of never returning. In Austria, national character is lost by authorized emigration from the empire *sine animo revertendi*; but emigration is not permitted without the license of the proper administrative authorities. So, in Prussia, the subject loses his national character by emigration, when such emigration is duly authorized. In Bavaria, the right of citizenship is lost by emigration, or by the acquisition, without the special permission of the king, of *jure indigenatus* in a foreign state. In Wurtemberg, citizenship is lost by emigration authorized by the government, or by the acceptance of a public office in another state. In Russia, the quality of a subject is lost by residence abroad, by voluntary expatriation, and by disappearance for the term of ten years from the place of his domicil. Spain and the Spanish American republics, contemplate and provide for the voluntary expatriation of their citizens and subjects, the right of expatriation, however, being made subject to certain conditions and restrictions. In several of the states of the American union expatriation is provided for and regulated by law, but this has reference only to allegiance due to the state, citizenship of a state being essentially different from citizenship of the United States, and a renunciation of allegiance to the former does not draw after it a renunciation of allegiance to the latter. There is no statute of the United States on the subject of expatriation and allegiance, but our naturalization laws seem to be based on the principle that every individual has the right to change his allegiance, and such has

been the language of our diplomatic communications. The decisions of our federal courts have generally been in reference to attempted expatriation and national character in time of war, and, therefore, in reference to international rather than municipal law. But, while recognizing, in common with the admiralty tribunals of England, a change of domicil for commercial purposes, the United States supreme court has, in no instance, admitted the distinct right of expatriation, independently of an act of congress to authorize it. In the case of *Inglis v. Sailors Snug Harbour*, that tribunal seems to have adopted the opinion that allegiance "rests on the ground of a mutual compact between the government and the citizen or subject," and that it "cannot be dissolved by either party without the concurrence of the other;" and equally strong expressions are used in its decisions in other cases. Chancellor Kent says: "From a historical review of the principal decisions in the federal courts, the better opinion would seem to be, that a citizen cannot renounce his allegiance to the United States, without the permission of government, to be declared by law; and that, as there is no existing regulation on the case, the rule of the English common law remains unaltered." Others, however, contend, that inasmuch as our naturalization laws admit the general doctrine of the right of expatriation, and the consequent transfer of native allegiance, citizens of the United States may expatriate themselves, in time of peace, the consent of the government being implied in the absence of any legislative prohibition. The same writers, however, admit that such consent can never be presumed where expatriation is resorted to in order to escape the punishment of crime, or the performance of obligations already incurred. The renunciation of nationality, they say, does not release him who avails himself of it from any of the obligations which he owes either to his country or to his countrymen, nor can it ever be appealed to as a mask to cover crime. In other words, they maintain that there is no such thing as an absolute or indefeasible right of expatriation, any more than there is an absolute or indefeasible right of allegiance. "Allegiance in these United States," says Chief Justice Robertson, "whether local or national, is, in our judgment, alto-

gether conventional, and may be repudiated by the nation as well as adopted citizen, with the presumed concurrence of the government, without its formal or express sanction.

\* \* \* \* The political obligations of the citizen, and the interests of the republic, may forbid a renunciation of allegiance by his mere volition or declaration, at any time and under all circumstances. And, therefore, the government, for the purpose of preventing abuse and securing the public welfare, may regulate the mode of expatriation. But when it has not prescribed any limitation on this right, and the citizen has, in good faith, abjured his country, and become a subject or citizen of a foreign nation, he should, as to his native government, be considered as denationalized." Mr. Attorney General Cushing, in commenting upon this decision, says, that it places the question upon "its true foundations"—"expatriation, a general right, subject to regulation of time and circumstances according to public interests, and the requisite consent of the state, presumed where not negatived by standing prohibitions." (*Phillimore, On Int. Law*, vol. 1, §§ 115, et seq.; *Grotius, De Jur. Bel. ac Pac.*, lib. 2, cap. 5, § 24; *Gunther, Das Europaisches Volkersrechts*, b. 2, p. 309; *Wheaton, Elem. Int. Law*, app. No. 1; *Wheaton, Hist. Law of Nations*, pp. 717, et seq.; *Jenkins, Life of Sir L.*, vol. 2, p. 718; *Fœlix, Droit International Privé*, §§ 27–55; *Cushing, Opinions U. S. Att'ys Gen'l*, vol. 8, pp. 125, et seq.; *Zouch, de Judicio inter Gentes*, pt. 2, s. 2, § 14; *May, Droit Public Bavière*, tome 2, §§ 159, 160; *Weishaar, Droit Privé de Wurtemberg*, tome 1, §§ 74–78; *Burge, Commentaries*, vol. 1, p. 712; *Revue Etrangère*, tome 1, pp. 552, 553; *Bouryer, Con'st Law of England*, p. 406; *Blackstone Com.*, vol. 1, p. 369; *Kent, Com. on Am. Law*, vol. 2, p. 49; *Inglis v. Sailors Snug Harbor*, 3 Peters Rep., p. 125; *Talbot v. Janson*, 3 Dal. Rep., 383; *The United States v. Williams*, 2 Cranch. Rep., p. 82, note; *Jansen v. The Christina Magdalena*, Bee's Rep., pp. 11–23; *The United States v. Gillies*, 1 Peters C. C. Rep., p. 159; *Shanks v. Dupont*, 3 Peters. Rep., pp. 242–247; *Ainslie v. Martin*, 6 Mass. Rep., p. 460; *Jackson v. Burns*, 3 Binney Rep., pp. 75–85; *Murray v. McCarty*, 2 Mumford Rep., p. 393; *Alsberry v. Hawkins*, 9 Dana Rep., p. 177; *Rawle, On the Constitution*, ch. 9; *Sergeant, Const. Law*, p. 819; *Puffen-*

dorf, *De Officio Homis*, lib. 2, cap. 18; *Bynkershoek, Quaest. Juris Pub.*, lib. 1, cap. 22; *Wolfius, Jus Naturae*, pt. 7, cap. 1, §§ 186, 187; *Burlamaqui, Droit de la Nature*, pt. 2, ch. 5, § 13; *Almeda, Derecho Publico*, tomo 1, cap. 17; *British Statutes*, 1 Geo., 1, c. 4; 7 and 8 Vic., c. 66; *U. S. Statutes at Large*, vol. 2, pp. 153–155; *Westlake, Private Int. Law*, §§ 20, et seq.; *Bello, Derecho Internacional*, pt. 2, cap. 5, § 2.)

§ 4. It is thus seen, that while public international law recognizes the right of one state to naturalize the native subjects of another, and consequently the right of such subjects to change their nationality, it also recognizes the right of this other state to regulate the allegiance of its own subjects, and to regulate or prohibit their expatriation. There is an apparent inconsistency in these two rules, for how can any particular state, by its municipal law, qualify a general maxim of international jurisprudence, or prevent the application to its own subjects, of an established principle of public law? This inconsistency, however, is more apparent than real. It must be remembered, that although international law recognizes the right of one state to naturalize or adopt the subjects of another, it is not *in virtue of this public law* that such citizen is naturalized or adopted, but *by virtue of the positive or municipal law of the country*, which naturalizes or adopts them. The *newly made* citizen is entirely the *creature* of municipal law, and is invested only with such rights, privileges, and immunities as that law is capable of conferring upon him. So, on the other hand, while international law recognizes the right of one state to retain the allegiance of its subjects, or to expatriate them, the tie which binds them is not formed, or its nature determined, by *public law*, but by the *municipal code* of such state. As the municipal law *makes* the citizen by naturalization, so, also, it *retains* or *unmakes* him, by retaining or dissolving his allegiance. Admitting, then, that the right of expatriation, in its broadest and most comprehensive sense, is recognized as a maxim of international law, this principle must be subordinate to the universally conceded doctrine of the same law, that every independent state possesses exclusive sovereignty within its own territory, that its laws bind all persons within its own jurisdiction, but cannot operate within the territory of another power. It results

from this view of the question, that so long as the naturalized citizen remains within the territory and jurisdiction of his adopted country, or within the jurisdiction of any other state than that which claims his primitive allegiance, he retains the national character conferred upon him by naturalization. But if, having renounced his primitive allegiance without the consent of his government, and contrary to its laws, he return to his native state, and places himself within its jurisdiction, he is subject to the obligations, charges, and penalties which the laws of that state have imposed upon him. And this result seems to have been acquiesced in by the executive department of the government of the United States, which government is supposed to have adopted the most liberal views with respect to the general right of expatriation and naturalization. In the case of Martin Koszta, a native of Austria, but claiming the right of domicil and naturalization in the United States, Mr. Secretary Marcy denied the right of Austria to enforce her claim to native allegiance in *Turkish* territory, outside of the limits of Austrian jurisdiction; but in the case of Simon Tousig, who had voluntarily returned to Austria, and placed himself within the reach of her municipal laws, Mr. Marcy declined making any demand for his release. In the case of J. P. Knacke, a naturalized citizen of the United States, who, on his return to his native country, (Prussia,) had been forced into the Prussian military service, Mr. Wheaton, the American minister at Berlin, (July 24th, 1840,) said: "Had you remained in the United States, or visited any other foreign country (except Prussia,) on your lawful business, you would have been protected by the American authorities at home and abroad, in the enjoyment of all your rights and privileges as a naturalized citizen of the United States. But having returned to the country of your birth, *your native domicil and national character revert*, (so long as you remain in the Prussian dominions,) and you are bound in all respects to obey the laws exactly as if you had never emigrated." In the case of Ignacio Tolen, a native of Spain, but naturalized in the United States, Mr. Secretary Webster, (June 25th, 1852,) said: "If that government (Spain,) recognizes the right of its subjects to denationalize themselves and assimilate with the citizens of other

countries, the usual passport will be a sufficient safeguard to you; but, if allegiance to the crown of Spain may not legally be renounced by its subjects, you must expect to be liable to the obligations of a Spanish subject, if you voluntarily place yourself within the jurisdiction of that government." Again, in the case of Victor B. Depierre, a native of France, naturalized in the United States, Mr. Webster, (June 1st, 1852,) said: "If, as is understood to be the fact, the government of France does not acknowledge the right of natives of that country to renounce their allegiance, it may lawfully claim their services when found within French jurisdiction." Mr. Secretary Everett, in a dispatch to the American minister, at Berlin, (January 14th, 1853,) says: "If a subject of Prussia, lying under a legal obligation in that country, to perform a certain amount of military duty, leaves his native land, and without performing that duty, or obtaining the prescribed certificate of emigration, comes to the United States and is naturalized, and afterward, for any purposes whatever, goes back to Prussia, it is not competent for the United States to protect him from the operation of the Prussian law." Mr. Secretary Cass, in the case of Le Clerc, in 1859, seemed to rest this question upon the same ground as his predecessors; but in the case of — Hofer, (June 14th, 1859,) and in his dispatch to the American minister at Berlin, (July 8th, 1859,) he took the position that "the doctrine of perpetual allegiance is a relic of barbarism," repudiated by the United States "ever since the origin of our government." "The moment a foreigner becomes naturalized, his allegiance to his native country is severed forever. He experiences a new political birth. A broad and impassible line separates him from his native country. He is no more responsible for anything he may say or do, or omit to say or do, after assuming his new character, than if he had been born in the United States. Should he return to his native country, he returns as an American citizen, and in no other character. In order to entitle his original government to punish him for an offense, this must have been committed whilst he was a subject, and owed allegiance to that government. The offense must have been complete before his expatriation. It must have been of such a character that he might



have been tried and punished for it at the moment of his departure. A future liability to serve in the army will not be sufficient, because, before the time can arrive for such service, he has changed his allegiance, and has become a citizen of the United States." This position is certainly somewhat in advance of that assumed in the previous diplomatic correspondence of our government, and, by some, is thought to infringe upon the universally conceded principle that sovereign states have the right of municipal legislation and jurisdiction over all persons within their own territory; and that while we have a perfect right, *within our jurisdiction*, to disregard the dogmas of universal allegiance incorporated in the laws of other states, they have an equally incontestible right, *within their jurisdiction*, to assume that *our* municipal regulations on the subject of naturalization do not cancel *their* statutes enjoining the charges and obligations, military or otherwise, which spring from the theory of allegiance embodied in *their* laws. If this view of Mr. Cass be correct, the right of expatriation is not only general but indefeasible, except in the single case specified, of offenses against his native state which are *completed* and punishable at the moment of his departure, and before his voluntary expatriation. Treason, then, committed by a subject, *after* "the moment of his departure" from his own country, if not "complete before his expatriation," is not liable to punishment, should he return to his native state with his certificate of foreign naturalization, for his adopted country may claim him as its own subject, and enforce his release. Moreover, it would be bound to do so, as much as if he were native born, and never had owed any other allegiance. (*Vide authorities in* § 3; also, *Breckenridge, Miscellanies*, p. 409; *American State Papers, For. Rel.*, vol. 1, p. 169; *Marcy, Letter on Koszta's case*, Sept. 26th, 1853; *Wheaton, Elem. Int. Law*, pt. 2, ch. 2, § 6, note; *Webster's Works*, vol. 6, p. 521; *Gardner, Institutes*, pp. 448, et seq.; *Cushing, Opinions U.S. Atty's Gen'l*, vol. 8, pp. 125, et seq.; *Webster, Letter to Sharkey*, July 5th, 1852; *Cong. Doc's*, 82d Cong., 1st sess. H. R., Ex. Doc. No. 10; 33d Cong., 1st sess. H. R., Ex. Doc. No. 41.)

§ 5. But whatever may be thought of the effect of the doctrine of allegiance upon the national character of the subject

within his native state, it certainly can produce no effect without the limits of its jurisdiction, for, even admitting that doctrine in its full extent, the obligations resulting therefrom are binding only within the state to which the individual originally belonged, without affecting, with reference to his adopted country, the validity of his naturalization there. And the nationality thus assumed must, according to the rules of international jurisprudence, be recognized by all other states except that which claims his primitive allegiance, until it is again changed by the municipal code of some state within whose jurisdiction he may eventually place himself. Nor does this abstract question of native allegiance effect national character, as determined by personal domicil; for it is a general rule of public law, that every person of full age has a right to change his nationality by choosing another domicil. It follows, then, that when a person who has attained his majority, removes to another place, and settles himself there, he is stamped with the national character of his new domicil; and this is so, notwithstanding he may entertain a floating intention of returning to his original residence or citizenship at some future period. (*Wheaton, Elem. Int. Law*, pt. 2, ch. 3, § 6, note; *Grotius, de Jur. Bel. ac Pac.*, lib. 3, cap. 2, § 7; cap. 4, §§ 7, 8; *Kent, Com. on Am. Law*, vol. 1, p. 72; *The Emanuel*, 1 Rob. Rep., p. 302; *The Neptunus*, 6 Rob. Rep., p. 408; *The Ann*, 1 Dod. Rep., p. 223; *The Etrusco*, 4 Rob. Rep., p. 262, note.)

§ 6. The national character of a merchant is determined by his *commercial domicil*, and not by the country to which his allegiance is due, either by his birth, or by his subsequent naturalization or adoption. He is regarded as a political member of the nation into which, by his residence and business, he is incorporated, and as a subject of the government which protects him in his pursuits, and to the support of which he contributes by his property and his industry. This rule of decision is adopted both in prize courts and in courts of common law, and is applied, in a belligerent country, to its own native subjects, as well as to those of a neutral power. Thus, a citizen of the United States who is settled abroad, during a war to which his government is a party, is, with respect to his property and trade, subject to all the disabili-

ties of an alien enemy, or entitled to all the privileges of a neutral, according to the hostile or neutral character of the country in which he has fixed his domicile. (*Dalloz, Repertoire, verb. Domicile*, § 34; *Bynkershoek, Quaest. Jur. Pub.*, lib. 1, cap. 3; *Phillimore, On Int. Law*, vol. 3, §§ 75, 85; *Wheaton, Elem. Int. Law*, pt. 4, ch. 1, §§ 16; *Duer, On Insurance*, vol. 1, pp. 494, 495; *Wheaton, On Captures*, p. 102; *Wilson v. Maryatt*, 8 Term Rep., p. 31; *The Vigilante*, 1 Rob. Rep., p. 1; *The Endraught*, 1 Rob. Rep., p. 19; *The Frances*, 1 Gallis. Rep., p. 614.)

§ 7. The legal term *domicil* has been variously defined. According to the Roman law, "In whatever place an individual has set up his household gods, and made the chief seat of his affairs and interests, from which, without special avocation, he has no intention of departing; from which, when he has departed, he is considered to be from home; and to which, when he has returned, he is considered to have returned home:—in that place, there is no doubt whatever, he has his domicile." Proudhon considers "domicil to consist of the *moral relation* subsisting between a man and the place of his residence," as distinguished from *physical existence* or actual residence. Phillimore says: "Domicil answers very much to the common meaning of our word *home*, and where a person possessed two residences, the phrase *he made the latter his home*, would point out that to be his domicile." He, however, considers the definition of Judge Rush, in the American case of *Guier v. Daniel*, as the best, viz: "A residence at a particular place, accompanied with positive or presumptive proof of intention to remain there for an unlimited time." (*Westlake, Private Int. Law*, § 30; *Foelix, Droit Int. Prive*, §§ 27, et seq.; *Phillimore, Law of Domicil*, § 11–16; *Justinian, Dig.* 50, t. 1. 27; *D'Argentré, ad Leg. Britorium*, art. 9, v. 4; *Desquiron, Traité du Domicile*, p. 42; *Vattel, Droit des Gens*, liv. 1, ch. 19, § 218; *Story, Conflict of Laws*, ch. 3, §§ 43, 44; *Proudhon et Valette, Des Personnes*, tome 1, ch. 9; *Boullenois, Traité des Lois, Coutumes, etc.*, obs. 32; *Guier v. Daniel*, 1 Binney Rep., p. 349, note; *Wolfius, Jus. Gentium*, cap. 1, § 187; *The Frances*, 8 Cranch. Rep., p. 385; *Elbers v. The U. Ins. Co.*, 16 Johns. Rep., 128.)

§ 8. Various decisions have been made by the different writers who have treated of domicil. Some authors who have divided it into two kinds, *principal* and *accidental*, the former being the centre of his affairs, and the latter his place of residence for a part of his time, or for a particular purpose. Another division is into *personal* and *commercial*, the former having reference to his personal or actual residence, and the latter to his place of business or trade. Kent says: "There is a *political*, a *civil*, and a *forensic* domicil." This division is sufficiently explained by the terms employed. Others, again, divide domicil according to birth, necessity and will, as, 1. Domicil of Origin, (*Domicilium Originis*;) 2. Domicil by Operation of Law, (*Domicilium Necessarium*;) 3. Domicil of Choice, (*Domicilium Voluntarium*.) Domicil of origin has reference, *first*, to the place of nativity, and *second*, to the residence of the parents, where the birth takes place during a temporary or accidental absence from their own domicil. Domicil by operation of law, comprises two classes, *first*, as determined by the laws of the state from which they are sent, as in the case of public officers employed in foreign countries, and persons exiled by way of punishment; and *second*, as determined by the laws of the place of residence. Domicil of choice may be considered, *first*, with reference to the laws of the place where a new residence is acquired, and *second*, with reference to the laws of the place where the former residence has been abandoned. All these are so intimately connected, and the latter so dependent upon the former, that it would be difficult to discuss each separately. We will, therefore, consider the general criteria of domicil, the rules of evidence applicable to different cases, the presumptions raised by law, and the proofs required to rebut these presumptions. (*Phillimore, Law of Domicil*, §§ 33-38; *Wolfius, Jus Gentium*, § 188; *Vattel, Droit des Gens*, liv. 2, ch. 19, § 218; *Stephens, Com. Law of England*, vol. 2, p. 427; *Kent, Com. on Am. Law*, vol. 2, pp. 429, et seq.; *Westlake, Private Int. Law*, §§ 28, et seq.; *Massé, Droit Commercial*, tome 3, p. 53; *Merlin, Répertoire, verb. Domicile*; *Dalloz, Répertoire, verb. Domicile*.)

§ 9. The question of domicil is often a very difficult one to determine, and involves considerations which require to

be weighed with peculiar care. It is also sometimes connected with circumstances of varied and conflicting import, which are well calculated to embarrass the mind of the most experienced judge. The great controlling principle, however, in determining domicile is the *intention* of the party. And when his intention to reside for an indefinite period or permanently, in the place where he is found, is established by proof, the length or brevity of his actual residence is of no avail to protect him from the consequences of the national character resulting from such residence. Thus, the property of a British merchant, who removed to a Dutch West India island but a day or two before it capitulated to British force, was condemned by a British court as that of an enemy, it being proved that he had gone there with the avowed design of forming a permanent establishment. (*Westlake, Private Int. Law*, §§ 22, 37, et seq.; *Phillimore, Law of Domicil*, § 16; *Cochin, Oeuvres*, tome 9, p. 124; *Wildman, Int. Law*, vol. 2, p. 40; *Duer, On Insurance*, vol. 1, p. 496; *The Diana*, 5 Rob. Rep., p. 60; *The Venus*, 8 Cranch. Rep., p. 288; *The Boedes Lust*, 5 Rob. Rep., p. 233; *Munro v. Munro*, 7 Clarke and Finnelly Rep. p. 76; *Merlin, Repertoire, verb. Domicile*, § 6; *Dalloz, Repertoire, verb. Domicile*, § 2.)

§ 10. But *mere intention*, without some *overt act*, is not sufficient to determine domicile, for that intention is liable to be revoked every hour. Courts have, therefore, always required, in such cases, something more than a mere verbal declaration—some solid fact, to show that the party is in the act of carrying that avowed intention into effect. Thus, an American domiciled in the enemy's country had avowed his intention to remove, as was proved by his correspondence; but, as he had taken no steps in pursuance of that intention, his property was condemned as that of an enemy. (*Phillimore, Law of Domicil*, § 16; *Wildman, Int. Law*, vol. 2, p. 43; *The President*, 5 Rob. Rep., p. 277; *The Cillo*, 3 Rob. Rep., p. 38; *The Venus*, 8 Cranch. Rep., p. 253; *The Frances*, 8 Cranch. Rep., pp. 335, 363; *Westlake, Private Int. Law*, § 37.)

§ 11. Where the party has avowed his intention with respect to residence, and his acts have corresponded with such declaration, the question of domicile is free from embarrassment. But, in most cases, no positive declarations of the

party whose domicile is in question can be proved — or, at least, none against his own interests — and, it becomes necessary to deduce his intention from the circumstances of his residence, occupation, and business relations. And these circumstances are of so mixed and varied a character as to render it impossible to embrace them all in any general definition. It is proper, however, to mention some of the most prominent of those which have heretofore influenced the decisions of the courts. (*Merlin, Repertoire, verb. Domicile*, § 6; *Phillimore, Law of Domicil*, § 16; *Westlake, Private Int. Law*, § 41; *Duer, On Insurance*, vol. 1, p. 496; *Wildman, Int. Law*, vol. 2, p. 37; *The Endraught*, 1 Rob. Rep., p. 24; *The Falcon*, 6 Rob. Rep., p. 198; *The Harmony*, 2 Rob. Rep., p. 322.)

§ 12. A most material and significant circumstance in determining the intention of the party, is the residence of his family. If he is married, and established with his family in the country where he is living, the inference is highly reasonable that he intends to reside there permanently. And, although his family may not be with him, if he has made preparations to have them join him, the same inference will be drawn. If he is not a married man, and has no social connections in the country where he is living, the court will look to other circumstances to determine his intentions. In case of double residence, the keeping up of a family mansion house, has much influence in determining domicile. (*Phillimore, Law of Domicil*, §§ 198, et seq.; *Duer, On Insurance*, vol. 1, p. 497; *The Jonge Ruiter*, 1 Act. Rep., p. 116; *Ennis et al. v. Smith et al.*, 14 How. Rep., p. 423; *Somerville v. Somerville*, 4 Vesey Rep., p. 750; *Westlake, Private Int. Law*, § 48.)

§ 13. The possession and exercise of political rights, and the payment of taxes, were considered by the Roman law as strong tests of domicile; but less weight seems to be given to these circumstances in England than by the civilians. Nevertheless, when taken in connection with other facts, they are not without their influence in determining national character in war. Sir William Scott, in the case of *The Dree Gebroeders*, said, that landed estate alone had never been held sufficient to constitute domicile, or fix the national character of the possessor, who is not personally resident upon it; and

Cochin denies that real estate derived from inheritance, is any proof of domicile. But, when taken in connection with actual residence, they may be received as proofs of *intention* to remain. So, of the purchase of property, real or personal; if a man has invested his capital in the country where he resides, in property, or enterprises which would require his personal attention and supervision for a long or indefinite period, or, if he has formed a partnership in business which is to continue for a number of years, the inference usually drawn from these facts is, that he intends to make that place his permanent residence, although no positive declaration to that effect is proved. (*Phillimore, Law of Domicil*, §§ 221-224, 256-258; *Touillier, Droit Civil*, liv. 1, tit. 3, n. 371; *Duer, On Insurance*, vol. 1, p. 497; *Ennis et al. v. Smith et al.*, 14 Howard Rep., p. 423; *Burge, Com. Conflict Laws*, pp. 42, 43; *Cochin, Oeuvres*, tome 3, p. 328; *The Dree Gebroeders*, 4 Rob. Rep., p. 235; *Warrender v. Warrender*, 2 Clarke and Finn. Rep., pp. 502-521; *Westlake, Private Int. Law*, § 48; *Merlin, Repertoire, verb. Domicile*, §§ 2, 3; *Dalloz, Repertoire, verb. Domicile*, § 2.)

§ 14. Another material circumstance by which intention is determined, is the character of the trade, or business, in which the party is engaged. If his commercial enterprises have their origin and centre in the country of his residence, although extending to other countries, or if his business is of such a character and extent as to require an indefinite period to bring it to completion, the fair inference is, that he intends to reside there permanently, and the court will therefore regard it as his domicile. (*Phillimore, Law of Domicil*, §§ 208, et seq.; *Duer, On Insurance*, vol. 1, p. 497; *The Vigilantia*, 1 Rob. Rep., p. 15; *The Anna Catharina*, 4 Rob. Rep., p. 118; *The Rendsborg*, 4 Rob. Rep., p. 121; *Westlake, Private Int. Law*, § 48; *Dalloz, Repertoire verb. Domicile*, § 2.)

§ 15. Another and most significant circumstance by which the intention may be ascertained, is the *time* of residence. In most cases, this circumstance is unavoidably conclusive in determining domicile. Even where the party had first gone to a foreign country for a special purpose, which would repel the presumption that he intended to make it his permanent residence, yet if he has remained a great length of

time, it will be presumed that his first intention has been changed, and that a general residence has grown, as is frequently the case, upon a special purpose. Hence, the plea of an original special purpose is not to be averred against a residence continued for a long period of time. If, however, a merchant has gone to a foreign country just before the war, for a special purpose, a fair time should be allowed to him to disengage himself; but if he should continue there during a good part of the war, contributing, by his industry and means, to the strength and security of the enemy, the plea of a special purpose cannot be urged with effect against the rights of hostility. (*Duer, On Insurance*, vol. 1, p. 498; *The Harmony*, 2 Rob. Rep., p. 322; *The Two Brothers*, 1 Rob. Rep., p. 131; *Phillimore, Law of Domicile*, §§ 259, et seq.; *Dalloz, Repertoire, verb. Domicile*, § 2.)

§ 16. In former times the particular situation of America, with respect to distance, was considered by the English courts as entitling the merchants of that country to some favorable distinctions in the matter of domicil, as determined by length of residence. It was, therefore, held that they might remain in an European state for a longer period than a merchant of a neighboring country, without being considered as a permanent resident. But, with the present facilities for communication afforded by steam and telegraph, it is doubtful if this favorable distinction would now be made. (*Duer, On Insurance*, vol. 1, p. 499; *Phillimore, On Int. Law*, vol. 3, § 303; *Ennis v. Smith*, 14 Howard Rep., p. 400; *The Harmony*, 2 Rob. Rep., p. 323; *The Oriental*, 7 Moore Rep., p. 398.)

§ 17. The presumption of law with respect to residence in a foreign country, is, that the party is there *animo manendi*, and it lies upon him to explain it. Thus, when the property of a foreigner, who, at the time of its shipment, was living in a hostile country, is seized as that of an enemy, the captors are not bound to prove that his place of residence was his actual domicil; but it rests upon him to disprove the presumption of the law, and, to redeem his property from the noxious imputation, he must give such evidence of his intentions and plans, as shall be effectual to destroy it. (*Westlake, Private Int. Law*, § 38; *Duer, On Insurance*, vol. 1, p. 500; *Wildman, Int. Law*, vol. 2, p. 40; *The Bernon*, 1 Rob. Rep.,



p. 103; *The Ann*, 1 Dod. Rep., p. 221; *Elbers v. U. Ins. Co.*, 16 Johns. Rep., p. 128; *Munro v. Munro*, 7 Cl. and F., p. 842.)

§ 18. In order to repel this presumption of the law, it is necessary for the party to prove that his original intention was to remain only for a short and definite period, that to accomplish the purpose of his visit, neither a long nor an indefinite period would be required; that his past residence had not been long enough, by the mere operation of time, to establish a domicile, and that he had not been so mixed up with the trade and navigation of the country, as to have acquired its national character, by the very nature of his occupation. The presumption is not repelled, by merely showing that his wife and family are still residing in his native country, nor by proving that he contemplates returning to his own country at some future period, or after he has accomplished some particular object. He may have separated himself from his family, or the period of his return may be wholly uncertain and indefinite; or, if definite, it may be after a long interval of time, or his neutral character may have been superseded by his occupation, or by his being so incorporated in the trade or navigation of the country, that its national character is completely fixed upon him. In order to repel this presumption of the law, he must show clearly and conclusively, that such residence in the foreign country, has not by the law of domicile, or otherwise, had any effect in changing his national character. This brings us to the examination of the different classes of what is called *necessary* domicile. (*Wildman, Int. Law*, vol. 2, p. 40; *Wheaton, Elem. Int. Law*, pt. 4, ch. 1, § 17; *Duer, On Insurance*, vol. 1, p. 500; *Phillimore, Law of Domicil*, § 39, et seq.; *The Bernon*, 1 Rob. Rep., p. 103; *Elbers v. The U. Ins. Co.*, 16 Johns. Rep., p. 1288; *Westlake, Private Int. Law*, § 38.)

§ 19. The national character of an ambassador, or public minister is not affected by his residence in a foreign country, no matter what may be its duration, or the circumstances indicative of the intent of the party to render it permanent. This results from the rule of extritoriality as already discussed. Being deemed a resident within the territory of his own state, the law of foreign domicile does not apply to him. But a consul does not come within this exception, although

mere residence in the performance of his official duties may not confer upon him a foreign domicile, nevertheless, his consular character affords no protection to his mercantile adventures. "If," says Duer, "he reside in a belligerent country, his ships and goods are liable to confiscation as those of an enemy, by the hostile belligerent; and they are subject to the same penalty in the country in which he resides, if they be employed in a trade with its public enemies, which is prohibited to its own subjects. Nor, to warrant the confiscation of his property, is it requisite that the consul should bear the character of a general merchant. If the transaction that leads to the seizure, is the only commercial speculation in which he is, or ever has been engaged, he is still a merchant, so far as that transaction extends, and must bear the consequences of the character he has assumed. The rule which thus distinguishes between the commercial and the official character of a consul, may sometimes operate in his favor. Where the consul of a belligerent power is engaged as a merchant, in the commerce of a neutral country, in which he resides, his property on the ocean, if employed in a trade strictly neutral, is exempt from hostile capture. His neutral character as a merchant, is unaffected by his belligerent character, as consul." (*Phillimore, Law of Domicil*, §§ 132, et seq.; *Kent, Com. on Int. Law*, vol. 1, pp. 44-77; *Duer, On Insurance*, vol. 1, pp. 513, 514; *Wheaton, Elem. Int. Law*, pt. 4, ch. 1, § 17; *Vattel, Droit des Gens*, liv. 4, ch. 8.; *The Indian Chief*, 3 Rob. Rep., pp. 27, 28; *The Josephine*, 4 Rob. Rep., p. 25; *The Dree Gebroeders*, 4 Rob. Rep., p. 233; *The Sarah Christina*, 1 Rob. Rep., p. 239; *Albrecht v. Sussman*, 4 Ves., and Beams Rep., p. 323; *Arnold v. U. Ins. Co.*, 1 Johns. cases, p. 363; *Wildman, Int. Law*, vol. 2, p. 41; *The Falcon*, 6 Rob. Rep., p. 197; *Griswold v. Waddington*, 16 Johns. Rep., p. 834; *Westlake, Private Int. Law*, § 47; *Dalloz, Repertoire, verb. Domicile*, § 4.)

§ 20. The French jurists have laid down the following rules respecting the domicile of officers, civil or military, employed in the public service: 1st, If the office be for life, and irrevocable, the domicile of the holder is in the place where its functions are to be discharged, and no proof of the contrary will be admitted, "for the law will not presume an intention

contrary to indispensable duty." 2d, If the office be temporary or revocable, the law does not presume that the holder has changed his original domicile, but proof will be admitted to establish the fact that he has done so. These two divisions, says Phillimore, seem to warrant a 3d: Where the office, although for life and irrevocable, requires the holder to reside only a part of the time in the place where its functions are to be discharged, the law will presume his domicile to be in that place, but this presumption will yield to proof that the seat of his family affairs,—the residence of his wife and children—is elsewhere, and that he has described himself, in all legal instruments, as belonging to the place of former domicile, and not to the place of his employment. Thus, in the case of Lord Somerville, the presumption was repelled, and it was held that his parliamentary duties in London, as a peer of Scotland, was no proof that his domicile was there. So, in the case of M. de Courtanel, it was held that the office of "grand maître des eaux et forêts," not requiring a fixed residence, did not prevent the law of original domicile from operating. (*Phillimore, Law of Domicil*, §§ 113, et seq.; *Denisart, Domicile*, ch. 2, § 5; *Merlin, Répertoire, verb. Domicile*, § 8; *Duranton, Droit Français*, liv. 1, tit. 3; *Somerville v. Somerville*, 5 Vesey Rep., p. 757; *Munroe v. Douglas*, 5 Mod. Rep., pp. 379–406; *Bruce v. Bruce*, 6. Brown. cases, p. 566; *Marsh v. Hutchinson*, 2 Bos. and Pul. Rep., p. 229, note; *Craigie v. Lewin*, 3 Curteis Rep., p. 435; *Bempde v. Johnstone*, 3 Vesey Rep., p. 200; *Westlake, Private Int. Law*, § 44; *Dalloz, Répertoire, verb. Domicile*, § 4.)

§ 21. It was a maxim of the Roman law, which has been incorporated into modern jurisprudence, that as the wife takes the rank, so does she also take the domicile of her husband; and, by the same analogy, the widow retains it after her husband's death. But if she marry again, her domicile becomes that of her second husband. The most noted case involving the domicile of the widow, was the disputed succession to the personal estate of Henrietta Maria, (widow of Charles the First,) who died in France. The betrothed, although in many respects enjoying the privileges of the wife, according to the Roman and civil law, retains the domicile which she had before her betrothment. It is generally con-

sidered that a wife divorced, *a mensâ et thoro*, may, after her divorce, choose her own domicil. But not so in case of a mere separation. A minor, who is not *sui juris*, cannot change his domicil of his own accord, (*propria Marte*;) his domicil is that of the father, or of the mother during widowhood, or, perhaps in some cases, of the legally appointed guardian. With respect to the question of *succession* to an intestacy, some writers contend that neither the mother nor the guardian can change the domicil of a minor whose father is deceased, while others hold the contrary doctrine; all, however, agree that the *forum* of the minor is that of the surviving parent or legal guardian. The domicil of an illegitimate minor is that of the mother. Students, whether majors or minors, are not considered as acquiring a domicil in the place where they sojourn merely for the purpose of prosecuting their studies. Servants may, or may not, have the same domicil as their masters, according to the particular circumstances of the case. (*Merlin, Repertoire*, verb. *Domicile*, § 5; *Phillimore, Law of Domicile*, §§ 89–112; *Justinian, Dig.* 50, 1, 87; *Code* xii, 1, 18, x, 40, 9; *Sir Leoline Jenkins, (Wynne's Life of,)* vol. 2, pp. 665–670; *Cochin, Oeuvres*, tome 2, p. 223; *Donnegal v. Donnegal*, 1 Addams Rep., pp. 5, 19; *Whitcombe v. Whitcombe*, 2 Curteis Rep., p. 352; *Gambier v. Gambier*, 7 Simon Rep., p. 263; *Guyer v. O'Daniel*, 1 Binney Rep., p. 349; *School Directors v. James*, 2 Watts and Serg. Rep., p. 568; *Freetown v. Taunton*, 16 Mass. Rep., p. 51; *Scrimshire v. Scrimshire*, 2 Hagg. Rep., p. 405; *Granby v. Amherst*, 7 Mass. Rep., p. 1; *Putnam v. Johnson*, 10 Mass. Rep., p. 498; *Westlake, Private Int. Law*, §§ 35, 36, 42, 43, 51; *Heffler, Droit International*, §§ 58, 59; *Dalloz, Repertoire*, verb. *Domicile*, § 4.)

§ 22. According to the Roman law, a soldier's domicil was in the country where he served, if he possessed nothing in his own country; but if he had any property in his own country, he would be allowed a double domicil. The leading modern case on this point is that of the Duke of Guise, who contracted a marriage while in the service of the King of Spain and the Emperor of Austria, during his residence at Brussels. The validity of this marriage depended upon his domicil at the time it was contracted. By the law of all

European countries, the prisoner preserves the domicile of his country. This principle is applied to the continued residence of a merchant in a foreign country. If such residence in a hostile country during a war is not voluntary, but proceeds from compulsory restraint imposed by the enemy, and his intention to leave is clearly manifested by overt acts previous to the capture of his property, it has been decided that such violent detention will not prevent its restoration. The same reasoning applies to a neutral merchant domiciled in a hostile country before the war. With respect to exiles, the civil jurists distinguish between banishment for life, and for a term of years; in the first, the exile loses his original domicile, but preserves it in the second, being regarded in the same light as a person on a long voyage. The fugitive or emigrant from his country, on account of civil war, is held not to have lost his intention of returning to it, and, therefore, retains his native domicile. But if the prisoner, exile, or fugitive continue to reside in a foreign country after the coercion has been withdrawn, and after his power of choice has been restored, he may acquire a domicile therein. (*Philimore, Law of Domicile*, § 146, et seq.; *Justinian, Dig.* 50, t. 1, l. 23; *Domat, Traité des Lois*, liv. 1, tit. 16, § 2; *D'Aguesseau, Oeuvres M. de le Chancelier*, tome 5, pp. 1, et seq.; *Morrison, Dic. of Decisions*, vol. 1, p. 4627; *Burge, Com. on Foreign and Col. Law*, vol. 1, p. 47; *White v. Repton*, 3 Curteis Rep., p. 818; *Duer, On Insurance*, vol. 1, p. 510; *Phillips, On Insurance*, vol. 1, p. 61; *The Ocean*, 5 Rob. Rep., p. 91; *Bempde v. Johnstone*, 3 Ves. Jun. Rep., p. 201; *The Indian Chief*, 3 Rob. Rep., p. 18; *The Ann*, 1 Dod. Rep., p. 221; *The Venus*, 8 Cranch. Rep., p. 279; *Westlake, Private Int. Law*, §§ 52, 53.)

§ 23. Suppose the government of the country of residence prohibits a foreigner from acquiring a domicile? It has been decided in France that a *de facto* domicile may be acquired, notwithstanding such prohibition, even with respect to the country of residence. This is placed on the ground that, although not entitled to the privileges of a domiciled subject, he may incur the liabilities. Again, suppose the government of a country forbade its subjects to establish a domicile out of their native land, may they not acquire a *de facto* foreign domicile. Undoubtedly they may, so far as respects

their national character in war, and Phillimore is of opinion that the personal property of such subjects who, having established a *de facto* domicile in a foreign country, must be distributed according to the law of the *de facto* domicile. He, however, admits that the case would be open to some argument on the other side. (*Phillimore, Law of Domicile*, §§ 801–806; *Merlin, Repertoire*, verb. *Domicile*, § 18; *Collier v. Rivaz*, 2 Curteis Rep., p. 885; *Westlake, Private Int. Law*, § 82; *Code Civil Francaise*, art. 13; *Bremer v. Freeman*, 1 Deane Rep., p. 192; *Dalloz, Repertoire*, verb. *Domicile*, § 4.)

§ 24. Treaties sometimes have the effect of preserving to the resident in a foreign country his original domicile, or of giving to him a commercial domicile, neither of the country of his origin nor that of his residence. Such has been the general effect of the treaties and commercial intercourse between Christian and Mohammedan states. In the Turkish dominions the control over and disposal of their property, its exemption from municipal laws, and other privileges, have been secured to Christians by treaty stipulations. In such cases, the domicile of their own countries is considered as preserved to foreign residents in the east, the ordinary rules of the international law of domicile not being applicable to such residence. In general, European and American merchants residing in the east under the protection of trading factories, are considered as retaining the national character of the factory to which they belong. This distinction results from the nature and habits of the east, foreigners not being permitted to mix freely with the native inhabitants, or to become incorporated into the mass of society. They, therefore, always continue to be strangers and mere sojourners, no matter what may be the circumstances, or length of time of their residence. As they cannot acquire the national character of the country where they reside, the law very properly considers them to have retained that of the country to which they belong. But this doctrine does not apply to christian countries. An attempt was at one time made to extend it to British merchants residing in Portugal, with special privileges which distinguished them from the native inhabitants, and from all foreigners of other countries; but the courts held, that the law of domicile of Europeans resid-

ing in the east was wholly inapplicable to such cases. (*Phillimore, Law of Domicil*, § 278, et seq.; *Duer, On Insurance*, vol. 1, pp. 511, 512; *Wildman, Int. Law*, vol. 2, p. 42; *The Indian Chief*, 3 Rob. Rep., p. 29; *The Twoe Frienden, etc.*, 3 Rob. Rep., p. 29-31; *Ruding v. Smith*, 2 Hagg. Rep., p. 386; *Moore v. Darell & Budd*, 3 Hagg. Rep., p. 350; *Maltass v. Maltass*, 8 Rob. Rep., p. 81.)

§ 25. If a neutral merchant go into an enemy's country during the war merely to collect his debts, or to withdraw the property which he may have there, his temporary residence, *for that purpose alone*, will not confer upon him a hostile character, and the property and funds thus sought to be withdrawn will not be subject to confiscation. But he must bring himself clearly within the rule, for, if instead of confining himself to the legitimate object of his visit, he engages in a trade purely national, his character with respect to such trade is regarded as hostile, and the property embarked in it, if captured, is condemned. It is contended by some that a neutral merchant residing in the enemy's country at the commencement of the war, should have the same privilege of withdrawing his property, and that for a reasonable time, it should be exempt from capture. But this doctrine has not been established by the positive adjudication of any court of prize. (*Wildman, Int. Law*, vol. 2, p. 40; *Vattel, Droit des Gens*, liv. 3, ch. 4, § 63; *Azuni, Droit Maritime*, pt. 2, ch. 4, art. 2, § 17; *Duer, On Insurance*, vol. 1, p. 502; *The Dree Gebroeders*, 4 Rob. Rep., pp. 233, 234; *The Ariadne*, 1 Rob. Rep., pp. 315, 316; *The Nereide*, 9 Cranch. Rep., p. 388.)

§ 26. The active spirit of commerce and enterprise in the present day, and the increased facilities for travel afforded by steam navigation and railroads, are well calculated to perplex the mind of a court in assigning accurately a merchant's national character, at different periods of a divided transaction. Thus, if he have charge of a complex mercantile business, he may be found, at no great intervals of time, in a variety of local situations, without any permanent residence in any one place. It is, therefore, held, that a merchant carrying on commerce in different countries, in time of war, has the national character of each, in his respective trades. This agrees with the maxim of the Roman law, that when a

man has so set up his household goods in two different places as to be equally established in both, both are to be regarded as his domicile. It, however, was remarked by Domat, (and this opinion was adopted by other jurists,) that although a man may have two or more domicils for particular purposes, yet it would be very difficult, if not impossible, for him to have two which should be equally the centre of his affairs. Hence municipal law, both in Europe and America, requires the characteristics of a *principal* domicile for cases of a testament, or a distribution under intestacy, while it permits the same person, at the same time, to have other domicils for certain purposes, and with respect to particular rights and property. (*Phillimore, Law of Domicil*, § 17, et seq.; *Domat, Traité des Lois*, liv. 1, tit. 16, § 6; *Merlin, Répertoire*, tit. 8, Domicile, § 7; *Felix, Droit International Privé*, liv. 1, tit. 1, § 29; *Curling v. Thornton*, 1 Addams Rep., p. 19; *Stanley v. Bernes*, 3 Hagg. Rep., p. 373; *Wildman, Int. Law*, vol. 2, pp. 49, 78; *Duer, On Insurance*, vol. 1, p. 499; *The Ann*, 1 Dod. Rep., p. 223; *The Harmony*, 2 Rob. Rep., p. 323; *The Portland*, 3 Rob. Rep., p. 44; *The Jonge Klassina*, 5 Rob. Rep., p. 297; *Guier v. Daniel*, 1 Binney Rep., p. 349, note; *Westlake, Private Int. Law*, §§ 28, et seq.; *Massé, Droit Commercial*, tome 3, p. 54; *Dalloz, Répertoire, verb. Domicile*, §§ 3, 4.)

§ 27. The native national character, lost, or suspended by a foreign domicile, easily reverts. The adventitious character imposed by domicile, ceases with the residence from which it arose. An actual return to his native country is not always necessary, nor even an actual departure from the country of his domicile, if he has actually put himself in motion *bonâ fide* to quit the country *sine animo revertendi*. But the commencement of the journey to return to his native country, although it may restore to the party his native national character, will not exempt his property from the hostile character acquired by residence, only in cases where such property has been engaged in a trade completely lawful in the native character. The principle can never be extended to protect a trade which is illegal in a native subject or citizen. Thus, an American citizen, domiciled in England previous to the war between the two countries, shipped goods from that country a long time after the commence-



ment of the war, and accompanied the shipment in person, with the intention of abandoning his English domicile, and resuming his American character. But his property was captured and condemned by an American prize court, on the ground that whether an English subject, or an American citizen, his property was liable to confiscation,—if the former, as that of an enemy; and if the latter, as that of a citizen unlawfully trading with an enemy. The mere return of a party, whether a belligerent subject or a neutral, to his native country, is not sufficient, of itself, to restore his native character. If he merely returns for a visit, or temporary purpose, and designs to resume his former residence, the character impressed on him by his foreign domicile, remains unchanged. In other words, his domicile, once established, is not broken by a temporary change of residence, and his property on the ocean, although shipped or captured during his absence, remains liable to confiscation. (*Grotius, de Jur. Bel. ac Pac.*, lib. 3, cap. 4, § 7; *Duer, On Insurance*, vol. 1, p. 520; *Wildman, Int. Law*, vol. 2, pp. 43–45; *The President*, 5 Rob. Rep., p. 277; *The Citto*, 3 Rob. Rep., p. 38; *The Venus*, 8 Cranch. Rep., p. 253; *The Frances*, 8 Cranch. Rep., pp. 335, 368; *La Virginie*, 5 Rob. Rep., p. 98.)

§ 28. In the application of the general rule that the native character of the party must be taken from that of the country where he resides, there is a material difference between removing from, and returning to, one's native country. Although the native character remains till a new domicile is acquired by actual residence or settlement in a foreign country, the adventitious character resulting from domicile, ceases with the residence from which it arose. But, according to the decisions of the courts of the United States, it is not sufficient to prove the mere intention of the party to return to his native country for the purpose of remaining there permanently; he must have actually commenced to return. The British courts, however, have, in some cases, considered other overt acts, when performed in good faith, as sufficient to restore the native national character, and in this opinion, Chief Justice Marshall coincided. (*Wildman, Int. Law*, vol. 2, pp. 44, 45; *Phillimore, On Int. Law*, vol. 3, § 85; *Wheaton, Elem. Int. Law*, pt. 4, ch. 1, § 17; *Duer, On Insurance*, vol. 1, pp. 515–520; *Westlake, Private Int. Law*, § 40.)

§ 29. It seems to be a well settled principle of international law that, during the existence of hostilities, (*flagrante bello*,) no subject of a belligerent can transfer his allegiance, or acquire a foreign domicile by emigration from his own country, so as to protect his trade either against the belligerent claims of his own country, or against those of a hostile power. In other words, his allegiance continues the same, and his native character is unaffected by his change of residence. This doctrine rests on the ground that to desert one's own country in time of war, is an act of criminality, and that if a citizen removed to another state, his allegiance is still due to his sovereign, and he is as much bound to abstain from trade with a public enemy, as if he had remained at home; and his property, as that of an enemy, continues to be just as liable to seizure and confiscation, by an opposite belligerent. This principle is sanctioned by the most approved writers on international law, and has been expressly affirmed by the courts of the United States. The doctrine above announced, is not in conflict with that contended for by some writers, that a citizen has a general right of expatriation in time of peace, and that the assent of his government to seek change of allegiance and national character, is implied in the absence of any prohibition. Nor is it to be construed as denying to a citizen the right to change his allegiance and national character in time of war, with the express consent of the state, and with authentic renunciation of preëxisting citizenship. But expatriation, in time of war, does not result from a change of residence, and the general consent of the state to emigration, which is presumed, in time of peace, from the absence of any general prohibition. If so, it might be appealed to as a mask to cover desertion, or treasonable aid to the public enemy. (*Wheaton, Elem. Int. Law*, pt. 4, ch. 1, § 17; *Duer, On Insurance*, vol. 1, pp. 521, 545; *Dalloz, Repertoire, verb. Domicile*, §§ 3, 4; *Grotius, De Jur. Bel. ac Pac.*, liv. 2, c. 5, § 2; *Vattel, Droit des Gens*, liv. 1, ch. 19, §§ 220–223; liv. 2, ch. 27; *Puffendorf, Droit des Gens, par Barbeyrac*, liv. 8, c. 11, § 3; *The Dos Hermanos*, 2 Wheaton Rep., p. 98; *Talbot v. Janson*, 8 Dallas Rep., pp. 162, 163; *The Santissima Trinidad*, 7 Wheaton Rep., p. 284; *Duguet v. Rhinelander*, 1 Johns. Cases, p. 360; *Jackson v. N. Y. Ins. Co.*,

2 Johns. Cases, p. 191; *United States v. Williams*, 2 Cranch. Rep., p. 82, note; *Murry v. The Charming Betsey*, 2 Cranch. Rep., pp. 64, 119; *The Venus*, 8 Cranch. Rep., p. 253; *The Frances*, 8 Cranch. Rep., p. 335.)

§ 30. Mere military occupation of a territory by the forces of a belligerent, (without confirmation of conquest by one of the modes recognized in international law,) does not, in general, change the national character of the inhabitants. It will be shown in a subsequent chapter, that the allegiance of such inhabitants is temporarily suspended, but not actually transferred to the conqueror. They owe to such military occupants certain duties, but these fall far short of a change of the allegiance due to their former sovereign. But if the military occupation be by a power in amity with the former sovereign, and has taken place with the evident concurrence of those acting under his authority, a prior and formal cession is presumed. The national character of the inhabitants is therefore deemed to be changed by the presumed transfer of their allegiance. Thus, the occupation of the Ionian republic by French troops, by the voluntary surrender of the Russian authorities, then at peace with France, was deemed sufficient to repel the supposition that such occupation was hostile and temporary, and therefore sufficient to raise the presumption of a formal cession, although none was proved. So of the inhabitants of territory in the possession and under the government of the conqueror prior to cession or complete conquest, for every commercial and belligerent purpose they are considered by other countries as subjects of the conqueror, notwithstanding that he himself may regard them as aliens with respect to the inhabitants of his other dominions. Upon this point, however, there are conflicting decisions, belligerents having sometimes regarded territory in the military occupation of their enemy as friendly, and sometimes as hostile, according to their own interests and the peculiar circumstances of the case. If the sovereign power of the state choose to permit a continuance of commerce with them, the courts of the same state will regard them as friendly, and *vice versa*. (*Wildman, Int. Law*, vol. 2, p. 115; *Duer, On Insurance*, vol. 1, p. 438; *The Roletta*, Edw. Rep., p. 171; *Benson v. Boyle*, 9 Cranch Rep., p. 191;

*Hagedorn v. Bell*, 1 Maule and Selw. Rep., p. 450; *Westlake, Private Int. Law*, § 24.)

§ 31. It will also be shown hereafter that, where the conquest is confirmed, or in any other way made complete, the allegiance of the inhabitants who remain in the conquered territory is transferred to the new sovereign. The same effect is produced by an ordinary cession of such territory. In either case the national character of the inhabitants who remain, is deemed to be changed from that of the former to the new sovereign, and in their relations with other nations they are entitled to all the advantages, and are subject to all the disadvantages, of their new international status. (*Vattel, Droit des Gens*, liv. 3, ch. 13, § 200; *Grotius, de Jur. Bel. ac Pac.*, lib. 3, cap. 8; *Westlake, Private Int. Law*, § 40; *Flemming v. Page*, 9 Howard Rep., p. 608; *American Ins. Co., v. Cauter*, 1 Peters Rep., p. 542; *United States v. Perchman*, 7 Peters Rep., p. 86; *Lucas v. Strother*, 12 Peters Rep., p. 436; *Campbell v. Hale*, 1 Cowp. Rep., p. 208; *McIlvaine v. Coxe's Lessee*, 4 Cranch Rep., p. 211.)

§ 32. But mere cession by treaty does not of itself operate as an immediate transfer of the allegiance of the inhabitants of the ceded territory. They remain subjects of the power to which their allegiance was originally due, until the solemn delivery of the possession by the ceding state, and an assumption of the government by that to which the cession is made. The actual delivery of the possession, and the actual exercise of the powers of government must be clearly shown. In a case of capture of property belonging to a merchant of New Orleans, after the cession of Louisiana by Spain to France, which, if the owner was a French subject, was hostile, and, if a Spanish subject, was neutral, Sir William Scott decreed the restoration, on the ground that the evidence of any actual delivery of the territory to any French authority, was insufficient and unsatisfactory. (*Wildman, Int. Law*, vol. 2, p. 115; *Duer, On Insurance*, vol. 1, p. 438; *The Fama*, 5 Rob. Rep., p. 106.)

§ 33. Revolution or possession by insurgents, as already stated, cannot be regarded by a prize court as changing the national character of the territory so possessed or occupied,

until the fact has been recognized by the political authority of the government to which the court belongs. Thus, although it was a matter of notoriety that a considerable part of the island of St. Domingo had, by revolt, been detached from the French colonial government, and its inhabitants were in common opposition to France, then at war with England, the court of appeal, nevertheless, decided that such inhabitants must be regarded as hostile in their commercial relations, till the British government should recognize their change of national character. But where any port or part of the island had been recognized by orders in council, as not in the possession and under the dominion of France, such port or place would be so considered by the court. The supreme court of the United States has adopted the same rule of decision. (*Wildman, Int. Law*, vol. 2, pp. 116, 117; *The Manilla*, 1 Edw. Rep., p. 1; *The Pelican*, 1 Edw. Rep., app. D; *Yrisarri v. Clement*, 3 Bing. Rep., p. 432; *Johnson v. Greaves*, 2 Taunt. Rep., p. 344; *Blackburne v. Thompson*, 3 Comp. Rep., p. 61; *Hoyt v. Gelston*, 3 Wheaton Rep., p. 324, note; *Kennett v. Chambers*, 14 Howard Rep., p. 38.)

§ 34. In many cases, the nature of the traffic or business in which an individual is engaged, may stamp upon him a national character, wholly independent of that which his place of residence alone would impose. Thus, although a neutral merchant, residing in his own country, and trading, in the ordinary manner, to the country of a belligerent, does not thereby acquire a hostile character, yet, if he is a privileged trader, engaged in a commerce that none but the subjects of the enemy are permitted to conduct, or that can only be carried on by a special license from the government, the place of his domicile will not protect such trade, but all his property embarked in it becomes liable to confiscation, as that of an enemy. So, also, if the neutral merchant has a house of trade in the hostile country, either as a partner, or on his sole account, all the commerce of such house is regarded as essentially hostile, and all his property engaged in it is liable to condemnation. The effect of the traffic in which a neutral vessel is engaged upon the national character of the owner, so far as such property is concerned, is fully discussed by Mr. Duer. (*Duer, On Insurance*, vol. 1, pp. 523-577; *Dalloz*,

*Repertoire, verb. Domicile*, §§ 1–4; *The Anna Catharina*, 4 Rob. Rep., p. 118; *The Rendsborg*, 4 Rob. Rep., p. 121; *The Leisbet*, 5 Rob. Rep., p. 283; *The Susa*, 2 Rob. Rep., p. 251; *Wildman, Int. Law*, vol. 2, pp. 48, 49; *The Vigilante*, 1 Rob. Rep., p. 15; *The Embden*, 1 Rob. Rep., p. 17.)

§ 35. There is, however, a very material distinction between the hostile character impressed by domicile, and that which results solely from the nature of the traffic in which the individual is engaged. A foreign merchant domiciled in the country of the enemy, is himself an enemy, in the same sense and to the same extent as a native subject; and all his property on the ocean, wherever it may be found, and whatever may be the nature of the commerce in which it is embarked, is liable to confiscation. But the hostile character which arises solely from the nature of the traffic, is limited, in its noxious and penal effects, to the transactions and property that the prohibited trade embraces; in all other respects, such individual still retains all the rights and immunities of a neutral, a subject, or an ally, as the case may be. (*Phillimore, On Int. Law*, vol. 3, § 85; *Duer, On Insurance*, vol. 1, pp. 523, 524; *The Anna Catharina*, 4 Rob. Rep., p. 119; *The Portland*, 3 Rob. Rep., p. 41; *The Nancy*, 1 Rob. Rep., pp. 14, 15; *The Freundschaft*, 4 Wheaton Rep., p. 107; *The San Jose Indiano*, 2 Gallis Rep., p. 268.)

§ 36. The habitual employment of an individual, may also affect his national character. Thus, a person employed habitually and constantly, as a master or mariner, or as a supercargo or commercial agent, in the trade and navigation of a hostile country, although he has no domicile there, in the civil and legal sense of the term, is impressed with its national character, and this hostile character spreads itself, in its consequences, *generally* over his affairs. It follows and involves all his property, in whatever trade employed, that does not appear, from other circumstances, to have acquired a distinct national character. In order to redeem it from confiscation on this ground, the burthen of proof is cast upon him. The principle seems founded in reason; for persons so employed are as much incorporated with the commerce of the hostile country, as persons who have their permanent residence in the enemy's territory. (*Phillimore, On Int. Law*,

vol. 3, § 85; *Duer, On Insurance*, vol. 1, p. 526; *The Embden*, 1 Rob. Rep., p. 17; *The Vriendshap*, 4 Rob. Rep., p. 167; *The Endraught*, 1 Rob. Rep., p. 22; *The Bernon*, 1 Rob. Rep., p. 102.)

§ 37. The national character of ships is, as a general rule, determined by that of their owners. But, as already shown, this rule is subject to many exceptions, a hostile character being not unfrequently impressed upon the vessel, while its owners are neutrals or friends. Thus, a hostile flag and pass, the carrying of military persons or despatches of an enemy, trading between enemy's ports, etc., will give to the vessel a hostile character, no matter what may be that of its owners. The national character of goods, as a general rule, follows that of their owner; but, as shown in the preceding chapters, this rule is sometimes varied by the character and conduct of the vessel in which they are found, by the acts of the commander or supercargo in whose hands they have been placed, and by the nature of the documentary evidence by which the ownership is attempted to be proved. The origin, nature and destination of the goods themselves are sometimes conclusive of their national character, whatever may be that of their proprietor. Thus, where the goods are the produce of an estate or plantation in an enemy's territory or colony, the soil impresses upon them a hostile character, although the owner may be a neutral, and resident in a neutral country. Although his general national character may be neutral or friendly, he is considered an enemy, with respect to that particular produce, which, therefore, in its course of transportation to another country, is liable to capture as enemy's property. The rule applies even where such produce has been shipped in time of peace. The other questions here alluded to have already been sufficiently discussed. (*Wildman, Int. Law*, vol. 2, pp. 84, 112; *Phillimore, On Int. Law*, vol. 3, §§ 485, 487; *Duer, On Insurance*, vol. 1, pp. 451, 535; *The Phoenix*, 5 Rob. Rep., p. 25; *The Maustrom*, 5 Rob. Rep., p. 21, cited; *The Anna Catharina*, 5 Rob. Rep., p. 167; *Bentzon v. Boyle*, 9 Cranch. Rep., p. 191; *The Herstelder*, 1 Rob. Rep., p. 115; *The Packet de Bilbao*, 2 Rob. Rep., p. 133; *The Carolina*, 1 Rob. Rep., p. 305; *The Fortuna*, 1 Dod. Rep., p. 87; *The Success*, 1 Dod. Rep., p. 130; *The Endraught*,

1 Rob. Rep., p. 20; *The Omnibus*, 6 Rob. Rep., p. 71; *The Welvaart*, 1 Rob. Rep., p. 124; *The Johanna Tholen*, 6 Rob. Rep., p. 72; *The San Jose Indiano*, 2 Gallis. Rep., p. 283; *The Sisters*, 5 Rob. Rep., p. 159; *The Planter's Wensch*, 5 Rob. Rep., p. 22; *The Magnus*, 1 Rob. Rep., p. 31; *The Commercen*, 1 Wheaton Rep., p. 382; *The Dree Gebroeders*, 4 Rob. Rep., p. 232; *De Cussy, Droit Maritime*, liv. 1, tit. 3. § 17; *Pistoye et Duverdy, Des Prises*, tit. 6.)



## CHAPTER XXX.

## RIGHTS AND DUTIES OF CAPTORS.

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§ 1. We have discussed, in the preceding chapters, the general rights of war over enemy's property, or property rendered hostile by the acts of its owners, or by the circumstances of its use or disposition; it remains to point out more particularly the rights and duties of its captors. As a general principle, capture is not dependent upon the element on which it happens to be made; nevertheless, usage and the

decisions of courts, have established rules for maritime capture, very different from those applicable to captures on land; and while the latter have, for a long time, undergone very little change, the former have been moulded into a system of regular practice. This has resulted, in part, from the fact that title to booty vests almost immediately on possession, while that to prize is acquired, as a general rule, only after condemnation by a competent court. Another cause of this result is, the very small value of booty taken in modern wars, as compared with the rich prizes captured on the ocean. Moreover, matters connected with military operations on land, have usually been determined by the varying decisions of courts martial, and of the executive and ministerial departments of government; while those springing from maritime captures, have been carefully investigated and decided by judges learned in the law, whose opinions, preserved in printed reports, are discussed by the tribunals of other countries, and commented on by the text-writers of different ages. We propose here to treat only of maritime captures, leaving the subjects of military occupation and conquest for another place. (*Phillimore, On Int. Law*, vol. 1, § 345; *Wildman, Int. Law*, vol. 1, p. 36; *Bentzon v. Boyle*, 9 Cranch. Rep., p. 198; *Brown v. The United States*, 8 Cranch. Rep., p. 185; *Pistoye et Duwerdy, des Prises*, passim.; *Bello, Derecho Internacional*, pt. 2, cap. 5, § 3; *Dalloz, Repertoire, verb. Prises Maritimes*; *De Cussy, Droit Maritime*, liv. 1, tit. 3, § 26.)

§ 2. The courts have decided that an act of taking possession is not indispensably necessary to a capture; an obedience to the summons of the hostile force, though none of that force be actually on board, is sufficient. The real surrender, (*deditio*) of a vessel, is dated from the time of striking her colors. But there must be a manifest intention to retain as prize, as well as an intention to seize, otherwise the capture will be regarded as abandoned. It is therefore generally necessary for the officer who seizes a prize to commit her to the care of a competent prize master and crew, because of a want of a right to subject the captured crew to the authority of the captor's officer. But the capture is not abandoned, though only a prize-master is put on board, if the captured crew be subjects of the same government as the captor. It has been

shown that, as a general rule, all property belonging to the enemy, found afloat upon the high seas, and all property so afloat, belonging to subjects, neutrals, or allies, who conduct themselves as belligerents, may be lawfully captured. All property condemned is, by fiction, or rather by intendment, of law, the property of enemies; that is, of persons to be so considered in the particular transaction. Hence, prize acts and laws of capture, with reference to enemy's property, are construed to include that of subjects, neutrals, and allies, who, in the particular transaction, are to be regarded as enemies. It has also been shown that a belligerent can exercise no rights of war within the territorial jurisdiction of a neutral state, and that this jurisdiction extends, not only within ports, headlands, bays, and the mouths of rivers, but to a distance of three miles from the shore itself. All captures, therefore, made by belligerents, within these limits, are, in themselves, invalid. But this invalidity can be set up only by the government of the neutral state, for, as to it only, is the capture to be considered void; as between enemies, it is deemed, to all intents and purposes, rightful. With respect to the enemy, no right is thereby violated; but with respect to the neutral, an offense has been committed, and he may restore the prize if in his power, or otherwise demand satisfaction. But if he omits or declines to interpose any claim, it is condemnable, *jure belli*, to the captors. Captures, as already shown, may be made not only by public ships of war and vessels commissioned as privateers, but also by non-commissioned vessels, boats, tenders, etc. This general right to make captures, results from the law of war, which places all the inhabitants of one belligerent state in the position of public enemies toward all the inhabitants of the other belligerent state. There, however, is a marked distinction between the rights of the captured property, acquired by public and commissioned vessels, and by those acting without any commission or authority. (*Phillimore, On Int. Law*, vol. 3, §§ 345, 349; *Bynkershoek, Quaest. Jur. Pub.*, lib. 1, caps. 8, 20; *Grotius, de Jur. Bel. ac Pac.*, lib. 3, cap. 6, § 10; *Pistoye et Duverdy, Traité des Prises*, tit. 2, 4; *Bello, Derecho Internacional*, pt. 2, cap. 5, §§ 3-5; *Dalloz, Répertoire, verb. Prise Maritime*, sec. 2, art. 3; *Merlin, Répertoire, verb. Prise Maritime*, §§ 2, 4

*Wildman, Int. Law*, vol. 2, pp. 147, 311; *De Cussy, Droit Maritime*, liv. 1, tit. 3, § 23; liv. 2, chs. 12, 24; *The Elsebe*, 5 Rob. Rep., p. 176; *The Julia*, 8 Cranch. Rep., p. 189; *The Esperanza*, 1 Hagg. Rep., p. 91; *The Hercules*, 2 Dod. Rep., p. 368; *The Resolution*, 6 Rob. Rep., p. 386.)

§ 3. The right to all captures vests, primarily, in the sovereign. When the capture enures to the benefit of individuals, it is in consequence of a grant by the state. The distribution of the proceeds of prizes, as has already been stated, must therefore depend upon the regulations of each state. Some are much more liberal in this respect than others. It has been held by the British prize courts, that the power of the crown to direct, before adjudication, the release of captured property, is not taken away by any grant of prize in a prize act, the preservation of such a power in the crown, being necessary in its relations with foreign states. The laws regulating the distribution of the proceeds of captures, apply only *after* condemnation. (*De Cussy, Droit Maritime*, liv. 1, tit. 3, § 26; *Wildman, Int. Law*, vol. 2, pp. 295, 300–305; *Phillimore, On Int. Law*, vol. 3, § 356; *The Elsebe*, 5 Rob. Rep., p. 173; *The Gertruyda*, 2 Rob. Rep., p. 211; *The Eutrusco*, 4 Rob. Rep., p. 262; *Ships taken at Genoa*, 4 Rob. Rep., p. 388; *The Thorshaven*, Edw. Rep., p. 102.)

§ 4. On the completion of the capture, the title to the captured property vests in the captor, or rather, in his sovereign; and as a general rule, capture is deemed complete when the surrender has taken place and the *spes recuperandi* is gone. With respect to *booty*, it is universally conceded that twenty-four hours possession completes the title of the captor, and the same rule formerly prevailed with respect to *maritime* captures; but modern usage, after much fluctuation, is likely to settle upon the principle, that the captor acquires an inchoate title by possession alone, and that, to make this complete and perfect, a condemnation by a competent court of prize is necessary. By the ancient law of Europe, the *perductio infra praesidia, infra locum tutum*, was considered necessary for the conversion of the property captured; but much difficulty arose as to what constituted a *perductio infra praesidia*. By a later usage, a possession of twenty-four hours was sufficient to divest the title of the former owner. This, accord-

ing to the commentaries of Grotius and Barbeyrac, is the meaning of the 287th article of the *Consolato del Mare*. Bynkershoek and Grotius, express themselves to the same effect, and Loccenius considered this rule as the general law of Europe. Lord Stair, decided this to the rule of law in Scotland, and, according to Valin, a similar practice prevailed in France. It was also the ancient law of England, that the former owner was divested of his property, unless it was reclaimed *ante occasum solis*. But the ordinance of 1649, directed a restitution upon salvage to British subjects, although the common law still prevailed where the enemy had fitted out the prize as a vessel of war. As England became more commercial, it became her settled policy to regard the property of a captured vessel as not changed, without a regular sentence of condemnation, pronounced by a court of competent jurisdiction, and the title, from the time of capture, till such condemnation, as in obedience, and not capable of being transferred. This principle is not only recognized by her prize courts, but is now firmly incorporated into her common law. The same rule is adopted by the courts, and incorporated into the statutes of the United States. But, as most of the continental states of Europe adhere, in a measure, to their ancient practice, both Great Britain and the United States, adopt toward them, in case of recaptures, the rule of reciprocity, giving to them the same measure of justice, which they mete out to others. But, this question belongs more properly to another branch of the subject, and will be discussed in the chapter on the rights of postliminy and recapture. (*Wheaton, Elem. Int. Law*, pt. 4, ch. 2, §§ 11, 12; *Wildman, Int. Law*, vol. 2, pp. 277-280; *Phillimore, On Int. Law*, vol. 3, §§ 407, et seq; *Grotius, De Jur. Bel. ac Pac.*, lib. 3, cap. 6, § 3; *Bynkershoek, Quaest. Jur. Pub.*, lib. 1, cap. 5; *Loccenius, Jus. Maritimum*, 2, 4, 4, §§ 4, 8; *Dalloz, Répertoire, verb. Prises Maritimes*, sec. 2; *Voet. J. Comm. ad Pandectas*, lib. 49, tit. 15, § 8; *Kent, Com. on Am. Law*, vol. 1, pp. 101, 102; *Martens, Précis du Droit des Gens*, liv. 3, ch. 7, § 822; *Goss et al v. Withers*, 2 Burr. Rep., p. 698; *The Henrick and Maria*, 4 Rob. Rep., pp. 46, 55; *The Ceylon*, 1 Dod. Rep., p. 105; *The L'Actif*, Edw. Rep., p. 185; *The Nostra Signora*, 3 Rob. Rep., p. 10; *Assievedo v. Cambridge*, 10 Mod. Rep., p. 77; *Brymer v. Atkins*, 1 H. Black. Rep., pp.

189-190; *The Flodoyen*, 1 Rob. Rep., p. 117; *The Estrella*, 4 Wheaton, Rep., p. 298.)

§ 5. It is incumbent on the captor to bring his prize, as speedily as may be consistent with his other duties, within the jurisdiction of a court competent to adjudicate upon it. But, if prevented by imperious circumstances from bringing it in, he may be excused for taking it to a foreign port, or for selling it, provided he afterwards reasonably subjects its proceeds to the jurisdiction of a competent court of prize. The court within whose jurisdiction the proceeds of the sale are brought, takes cognizance of the case, and adjudicates not only upon the validity of the original capture, but also upon the disposition which has been made of the captured property. But this subject will be more particularly considered in another place. (*Bello, Derecho Internacional*, pt. 2, cap. 5, § 5; *Phillimore, On Int. Law*, vol. 3, §§ 361-364; *Wildman, On Int. Law*, vol. 2, pp. 164, 168-170; *The Peacock*, 4 Rob. Rep., p. 192; *Jecker et al. v. Montgomery*, 13 Howard Rep., p. 516; *The Principe*, Edw. Rep., p. 70; *The Wilhelmina*, 5 Rob. Rep., p. 143; *The Washington*, 6 Rob. Rep., p. 275; *The Madonna del Burso*, 4 Rob. Rep., p. 169; *The Corier Maritimo*, 1 Rob. Rep., p. 287.)

§ 6. *Joint captures* are those made by two or more vessels acting in conjunction, or by one or more vessels with the coöperation of land forces. Where all captured property is condemned to the government, it is of very little importance who are to be considered the real captors, where several lay claim to that title; but where captured property is condemned as prize to the benefit of the captors, it becomes a question of special interest to determine who are, in law, to be considered as captors, and, consequently, to share in the prize. As a general rule, all the parties who are actually engaged in the seizure, or who directly contribute to the surrender, are properly to be considered as joint captors, and, consequently, share in the prize, but the actual amount of assistance necessary to constitute joint capture, under the different circumstances of chase and surrender, as determined by the decisions of courts of prize, depends in a great measure upon the character of the vessels and their position at the time of actual seizure. (*Phillimore, On Int. Law*, vol. 3,

§§ 386, et seq.; *Wildman, Int. Law*, vol. 2, pp. 327, et seq.; *Bynkershoek, Quaest. Jur. Pub.*, lib. 1, cap. 18; *Pistoye et Duverdy, Traité des Prises*, tit. 9, ch. 2, sec. 4; *Dalloz, Répertoire, verb. Prises Maritimes*, sec. 8.)

§ 7. We will first consider joint capture *by public vessels of war*. All ships of war which are *in sight* at the time of the actual seizure, are deemed to be constructively assisting, and, therefore, are entitled to share in the prize. The reason of this rule is, that public ships are under a constant obligation to attack the enemy wherever seen, and, therefore, from the mere circumstance of being in sight, a presumption is sufficiently raised that they are there *animo capiendi*; and this rule is additionally supported by the obvious policy of promoting harmony in the naval service. But the vessel claiming such *constructive* assistance, must be actually in sight at the time of capture, or at least at the commencement of the engagement or chase, for there must be some actual contribution of endeavor as well as of general intention. If the circumstances of the case repel the presumption of the *animus capiendi*, as where the public ship is steering an opposite or a different course, inconsistent with the notion of an intent to capture, the claim to joint capture cannot be sustained. But the mere sailing on a different course is not sufficient to defeat this claim; for it is not always necessary that two vessels should pursue the same line, where, acting with an unity of purpose, the same object being sometimes better accomplished by one vessel sailing in one direction, and another in a different direction. But, if the ship claiming as joint captor has changed her course before the actual capture, in such a manner as to show that she had abandoned all design of continuing the pursuit, the claim is defeated. So, also, if the prize has been merely reconnoitered, without any attempt at pursuit. It is very doubtful whether merely seeing the prize from masthead, however clearly the *animus capiendi* may be proved, will bring the case within the rule of being *in sight*. In all cases of constructive joint capture, the *onus probandi* rests upon the party claiming the benefit of the rule. Nor is it sufficient to prove that the joint captor was in sight of the actual captor; it is also necessary that she was seen by the prize. Both these facts must be established;

the one by direct evidence, and the other by implication and necessary inference. Being in sight, means been seen by the prize, as well by the actual captor, and thereby causing intimidation to the enemy, and encouragement to the friend. One of these will not do without the other. (*Bynkershoek, Quaest. Jur. Pub.*, lib. 1, cap. 18; *Du Pouceau, Translation of Bynkershoek*, note, p. 144; *Phillimore, On Int. Law*, vol. 3, § 487; *Wildman, Int. Law*, vol. 2, pp. 327, 343–345; *The Drie Gebroeders*, 5 Rob. Rep., p. 339; *The Jan Frederick*, 5 Rob. Rep., p. 120; *La Melanie*, 2 Dod. Rep., p. 122; *The Robert*, 3 Rob. Rep., p. 194; *Le Neimen*, 1 Dod. Rep., p. 9; *The Lord Middleton*, 4 Rob. Rep., p. 153; *The Spankler*, 1 Dod. Rep., p. 359; *The Union*, 1 Dod. Rep., p. 346; *The Rattlesnake*, 2 Dod. Rep., p. 85.)

§ 8. But actual sight is not absolutely necessary to constitute constructive joint capture. If it be shown that the asserted joint captor was in sight when the darkness came on, and that she continued steering the same course by which she was before nearing the prize, and that the prize itself also continued the same course, it amounts almost to a demonstration that the vessels would have seen, and been seen by each other at the time of capture, if darkness had not intervened. In such a case, the vessel so pursuing is let in to the benefit of joint capture. But, if the seizure is made at such a distance from the asserted joint captor that she could not have been in sight if it had not been day, the claim cannot be sustained. (*Wildman, Int. Law*, vol. 2, p. 343; *Phillimore, On Int. Law*, vol. 3, §§ 394, 395; *The Union*, 1 Dod. Rep., p. 346; *The Financier*, 1 Dod. Rep., p. 61.)

§ 9. In respect to *joint chase*, much depends upon whether the vessels are acting in association, or separately with a common object in view. In the latter case, the question of actual or constructive sight will generally determine the claim to joint capture, as stated in the preceding paragraph. If the claimant, or the prize, changed her course in the night, and, at the time of actual capture could not have been seen by each other in daylight, the mere fact that the chase had the effect of throwing the prize into the hands of the actual taker, will not vary the case. Constructive captures are never allowed to be deduced from such assistance, whether



designed or accidental. (*Phillimore, On Int. Law*, vol. 3, § 393; *Le Neimen*, 1 Dod. Rep., p. 9; *The Financier*, 1 Dod. Rep., p. 61; *The Melanie*, 2 Dod. Rep., p. 122.)

§ 10. No *antecedent* or *subsequent* services in the expedition will entitle a party to the benefit of joint capture, where he would not otherwise be entitled to share. Thus, a ship of war sent for reinforcements to Lord William Bertrick, on hearing the firing of the fleet upon Genoa, returned from Leghorn, and was in sight at the time of the capitulation; but, as the ship was ignorant of the object of the attack, and the captors were ignorant of her approach, she was not allowed to come in as a joint captor. So, of a ship of war which was dispatched to join the contingent expedition against Buenos Ayres, but did not arrive till after the surrender. (*Phillimore, On Int. Law*, vol. 3, § 192; *Wildman, Int. Law*, vol. 2, p. 338; *The Buenos Ayres*, 1 Dod. Rep., p. 28; *Genoa and Lavona*, 2 Dod. Rep., p. 88.)

§ 11. In respect to captures made by ships which are associated in the same service or joint enterprize, under the same superior officer, as a general rule all are entitled to share as joint captors, although not in sight at the time of capture. The fleet so associated is considered as one body, acting together for one single object, and what is done by a part enures to the benefit of all. The only question to be considered is, whether the capturing ships at the time the capture was made, composed, *de facto*, a part of the particular fleet. Thus, where a capture was made by ships composing part of a squadron employed in the blockade of the Texel, out of sight of the fleet and without any concurrence in chasing, the court held that the blockading fleet were all joint captors. So, where a prize coming out or entering a blockaded port is taken by one of the ships of a blockading squadron stationed off the mouth of the harbor, while the rest of the squadron, maintaining the blockade, are stationed at some distance. In the case of *The Guillaume Tell*, a squadron was stationed to watch the harbor of La Vallette. The prize, in attempting to escape, was pursued and taken by a part of the squadron, while the others remained stationary. The claim to joint capture was allowed, notwithstanding the

physical impossibility of active coöperation arising from the state of the wind. (*Phillimore, On Int. Law*, vol. 3, § 398; *Wildman, Int. Law*, vol. 2, pp. 330–332; *The Forsigheid*, 3 Rob. Rep., p. 311; *Edw. Rep.*, p. 124; *The Harmonie*, 3 Rob. Rep., p. 318; *The Henriette*, 2 Dod. Rep., p. 96; *The Guillaume Tell*, *Edw. Rep.*, p. 6; *The Empress*, 1 Dod. Rep., p. 368.)

§ 12. But mere association is not sufficient to entitle vessels to share as constructive joint captors; they must have a military character, and be capable of rendering military service; in other words, there must be an *animus capiendi*. Thus, a ship forming part of a blockading squadron, but totally unrigged, and incapable of rendering any service at the time of capture, is held to be as much excluded as one totally unconcious of the transaction; because, by no possibility could that ship be enabled to coöperate in time. So of transports and store-ships, although associated in the same service with the actual captor, if destitute of a military character, and incapable of rendering assistance, they cannot be regarded as joint captors. It is not sufficient that the enemy may have been intimidated by the presence of such vessels. Mere intimidation may be produced without any coöperation having been given or intended. If a frigate were going to attack an enemy's vessel, and four or five large merchant ships, unconcious of the transaction, should appear in sight, they might be objects of terror to the enemy, but such terror would not entitle them to share in the prize as joint captors. (*Wildman, Int. Law*, vol. 2, pp. 332, 335; *Phillimore, On Int. Law*, vol. 3, § 398; *The Cape of Good Hope*, 2 Rob. Rep., p. 274; *The Twee Gesuster and Le Franc*, 2 Rob. Rep., pp. 284, 285, note; *The Guillaume Tell*, *Edw. Rep.*, p. 6.)

§ 13. Convoying ships are under no disability of claiming as joint captors an account of their employment, if, in other respects, entitled to share in the prize, unless the capture is made at such a distance as would remove them from the performance of the special duty of protecting their convoy. Being military ships and capable of rendering assistance, (where not interfering with this special duty,) they are entitled to all the benefits of constructive capture, whether the construction arises from association, sight, or otherwise. But

if the convoying ship desert her duty, she forfeits all benefit of capture. (*Wildman, Int. Law*, vol. 2, p. 345; *The Waaksamheid*, 3 Rob. Rep., p. 1; *The Fury*, 3 Rob. Rep., p. 9; *Phillimore, On Int. Law*, vol. 3, § 395.)

§ 14. If a vessel be detached from the fleet at the time of capture so as to separate her from the joint object, she cannot be considered as a constituent part or member of the association, and cannot claim the benefit of joint capture with the fleet, nor can the fleet be allowed to come in as joint captors in any prize taken by her after she was detached. Thus, where two vessels of a blockading squadron were sent to look out for an enemy's ship and captured her, the rest which maintained their station, were held not entitled to share. So, where two vessels were detached, one by stress of weather and another in chase, they were held not entitled to share in a capture made in their absence. But where two vessels were sent to chase and the rest of the fleet were bearing up to support them, the claim of the latter to joint capture was allowed. And a ship, forming a part of a blockading squadron and continuing as such, although temporarily detached at the time of the summons, and not returning till after the capitulation of the place so blockaded, was, nevertheless, entitled to share as joint captor with the rest of the blockading force. So, a ship in joint chase of one vessel, being ordered by a superior to chase another, the two chasing vessels are regarded as associated for the joint object of capturing both of those chased, and, although only one is captured, they jointly share in the prize. But if neither received or was actually under the orders of the other, or of a common superior, the case would be different. (*Phillimore, On Int. Law*, vol. 3, § 398; *Wildman, Int. Law*, vol. 2, pp. 330-338; *The Forsigheid*, 3 Rob. Rep., p. 311; *Edw. Rep.*, p. 124; *The Island of Trinidad*, 5 Rob. Rep., p. 92; *The Stella del Norte*, 5 Rob. Rep., p. 349; *The Empress*, 1 Dod. Rep., p. 368; *L' Etoile*, 2 Dod. Rep., p. 106; *The Naples Grant*, 2 Dod. Rep., p. 273; *The Nordstern*, cited, *Edw. Rep.*, p. 126; *The Geneux*, cited, *Edw. Rep.*, p. 16.)

§ 15. When land and sea forces act in conjunction, and no express provision is made by statute for the distribution of prizes taken by their joint operation, resort must be had to

the principles established by judicial decisions. It has been held that a mere general coöperation, in the same general objects, will not be sufficient to make land forces joint captors with a fleet; there must be an actual assistance and coöperation in the particular capture. Where there is pre-concert, a very slight service is sufficient. So, where soldiers are landed on the coast, to coöperate with a fleet, in a conjunct expedition, or in a particular engagement, they are entitled to share in the capture. In the case of a claim on the part of the army, to share in a capture made by the fleet, the *onus probandi* lies upon them to show that there was an actual coöperation on their part, assisting to produce the surrender. Without a pre-concert, or conjunct expedition, they are not entitled to the benefit of constructive capture; therefore, to establish a claim of joint capture between them, there must be a contribution of actual assistance, and the mere presence, or being in sight, will not be sufficient. Between public ships of war, there is always conceived to be a privity of purpose, which constitutes a community of interest; and this community of interest extends to public ships of different countries, if allies; but between land and sea forces, acting independently of each other, no such privity can be presumed. Hence, the difference of the rules applicable to the two cases. (*Phillimore, On Int. Law*, vol. 8, § 399; *Wildman, Int. Law*, vol. 2, p. 339; *The Stella Del Norte*, 5 Rob. Rep., p. 349; *The Dordrecht*, 2 Rob. Rep., p. 55.)

§ 16. The public ships of allies, serving together, are entitled to share in captures, the same as those of a single belligerent. There is no difference in this respect, whether the benefit of joint capture goes to the government or to the vessels, their commanders and crews. If, of two allied joint captors, the government of one has made a grant of the prize, and the other has not, the condemnation will be, in the former case, directly to the joint captor, and in the latter, to the government, according to the share of each. A question may arise, in case of joint capture by allies, with respect to the court which shall be entitled to adjudicate upon the capture. By the convention of May 20th, 1854, entered into between France and England, it was stipulated, (art. 2,) that when a joint capture shall be made by the naval forces

of the two countries, the jurisdiction of the country whose flag shall have been borne by the officer having the superior command in the action; and, (art. 2,) that when a capture shall have been made by a cruiser of either of the two allied nations, in the presence and in the sight of a cruiser of the other, such cruiser contributing to the capture, the adjudication of the case shall belong to the jurisdiction of the country of the actual captor. These rules are founded in reason, and will probably be adopted in all similar cases. (*Phillimore, On Int. Law*, vol. 3, § 401; *Merlin, Repertoire, Prise Maritime*, § 14; *Ortolan, Diplomatie de la Mer*, tome 2, appen. special; *Pistoye et Duverdy, des Prises*, tome 2, app.; *Dalloz, Repertoire, Prise Maritime*, sec. 8, art. 3.)

§ 17. It has already been stated that, as public ships of war are under a constant obligation to attack the enemy wherever seen, and as a neglect of this duty is not to be presumed, there is a privity of purpose, which constitutes a community of interest, and the mere circumstance of being in sight, is sufficient to entitle such a vessel to the benefit of joint capture. But as the same obligation does not rest upon privateers, the law does not give them the benefit of the same presumption of an *animus capiendi*. They generally clothe themselves with commissions of war for private advantage only; and, however allowable this may be when combined with other considerations of public policy, it will not lead to the same inference, as in the case of public ships of war. Hence, the *animus capiendi* of a privateer must be demonstrated by some overt act, by some variation of conduct, which would not have taken place, but with reference to that particular object, and if the intention of acting against the enemy had not been entertained. A different rule would induce privateers to follow in the wake of public ships of war, and keeping in sight of them, merely to become entitled to the joint benefit of the captures which they might make. But a public ship of war, is entitled to the benefit of constructive joint capture, where the actual taker is a privateer, the same as though both were vessels of war. The reason of this rule is obvious. (*Phillimore, On Int. Law*, vol. 3, §§ 388; 389; *Wildman, Int. Law*, vol. 2, p. 341; *Bynkershoek, Quaest. Jur. Pub.*, lib. 1, cap. 18; *L'Amitié*, 6 Rob. Rep., p. 261;

*The Santa Brigada*, 3 Rob. Rep., p. 52; *The Forseghid*, 3 Rob. Rep., p. 311; *Talbot v. Three Briggs*, 1 Dallas. Rep., p. 95; *La Flore*, 5 Rob. Rep., p. 238; *The Galen*, 2 Dod. Rep., p. 19; *The Dree Gebroeders*, 5 Rob. Rep., p. 339.)

§ 18. Revenue cutters are sometimes furnished with letters of marque and cruize, beyond the ordinary limits of their duty as coast guards, for the purpose of capturing enemy's merchant vessels. They are public vessels, but not public vessels of war, and, with respect to the benefits of joint capture, are, by English courts, considered in the light of privateers, and the rule of constructive assistance, from being in sight, does not apply to them; for, not being under the same obligations as king's ships to attack the enemy, they are not entitled to the same presumption in their favor." (*Phillimore, On Int. Law*, vol. 3, § 395; *Wildman, Int. Law*, vol. 2, p. 351; *The Bellona*, Edw. Rep., p. 63; *Dalloz, Repertoire, verb. Prises Maritimes*, sec. 8.)

§ 19. With respect to captures made by boats, it is a general rule, that the ships to which they belong, are entitled to share as joint captors; or rather, the capture is considered as made by the ship, the boats being a part of the force of the ship. But if the capturing boat has been detached from the ship to which it belongs, and attached to another, only the ship to which it is attached at the time of capture, shares in the prize. Mere constructive capture by boats, will hardly entitle the ships to which they belong, to be allowed to come in as joint captors, for the fact of boats being in sight, does not necessarily raise the presumption of assistance, by the intimidation of the enemy, and the encouragement of the friend. Thus, where the boats of a ship, lying in a harbor, were within sight of a capture, it was held the ship could not be allowed to share as joint captor. (*Phillimore, On Int. Law*, vol. 3, § 396; *Wildman, Int. Law*, vol. 2, p. 349; *The Anna Maria*, 3 Rob. Rep., p. 211; *The Odin*, 4 Rob. Rep., p. 318; *The Melomane*, 5 Rob. Rep., p. 41.)

§ 20. Captures made by tenders are regulated by the same rules as those made by boats, the ship to which the tender is attached being entitled to share, however distant she may be at the time of capture. But, in order to support the aver

ment that the claimant was the principal, and the capturing vessel a mere tender, it must be shown, either that there had been some express designation of her as of that character, or that there had been a constant employment and occupation in a manner peculiar to tenders, equivalent to an express designation, and sufficient to impress that character upon her. (*Phillimore, On Int. Law*, vol. 3, § 397; *Wildman, Int. Law*, vol. 2, pp. 334, 335; *The Carl*, Spink Rep., p. 261; *The Charlotte*, 5 Rob. Rep., p. 580; *The Melomane*, 5 Rob. Rep., p. 41; *The Island of Curaçoa*, 5 Rob. Rep., p. 282, note; *The Anna Maria*, 3 Rob. Rep., p. 211.)

§ 21. Prizes hold the same relation to their captors, as do the boats of the same vessel. Hence, prize interests acquired by a prize-master on board of a captured vessel, enure to the benefit of the whole ship's company. This is the natural and reasonable result of that community of interest existing between the prize-master and prize-crew, and the capturing vessel, the former being merely temporarily detached to take the prize into port, but without any real separation of object or interest. (*Wildman, Int. Law*, vol. 2, § 334; *Phillimore, On Int. Law*, vol. 3, § 396; *The Anna Maria*, 3 Rob. Rep., p. 211; *The Odin*, 4 Rob. Rep., p. 318; *The Melomane*, 5 Rob. Rep., p. 41; *The Belle Coquette*, 1 Dod. Rep., p. 18; *The Nancy*, 4 Rob. Rep., p. 327, note.)

§ 22. The general rules of joint capture for commissioned privateers, are also applicable to non-commissioned vessels; with this distinction:—that all captures by the latter must be condemned to the government as *droits of admiralty*, the captors only receiving compensation in the nature of salvage, which is usually awarded by the prize court, where their conduct has been fair; and in cases where there has been great personal gallantry and merit, the whole value of the prize is given them. Where a vessel has a commission against one enemy, but none against another whose property is captured, it is regarded as non-commissioned with respect to that particular capture. If, at the time of the capture by a vessel commissioned by letter of marque, the master of the capturing vessel be not on board, the capture is considered as made without commission, and enures to the government. So of

a vessel fitted out and manned by a ship of war, and acting without any authority or commission; unless brought within the definition of a *tender*, it is deemed a non-commissioned vessel, and its captures enure, not to the benefit of the man-of-war, but to the government. But the question whether the capture is made by a duly commissioned captor, or not, is one between the government and the captor, with which claimants have nothing to do; they have no legal standing to assert the right of the state. (*Wildman, Int. Law*, vol. 2, pp. 336, 337; *Phillimore, On Int. Law*, vol. 3, § 383; *The Charlotte*, 5 Rob. Rep., p. 280; *The Melomane*, 5 Rob. Rep., p. 41; *The Dos Hermanos*, 2 Wheat. Rep., p. 76; *The Cape of Good Hope*, 2 Rob. Rep., 274.)

§ 23. Where a privateer or a non-commissioned vessel is the actual captor, and a man-of-war only a joint captor, the latter has no right to dispossess the former, but is entitled to put some one on board to take care of the interests she may have in the capture. It is not essential, but a measure of proper precaution and of great convenience, that an interest should be asserted at the time. Where expenses were incurred by the actual captor in consequence of an omission of this precaution, they were directed to be paid out of the proceeds. Where a man-of-war and a privateer were joint chasers, and the privateer came up first, and struck the first blow, but the man-of-war was the actual taker, they were held to be joint *actual* captors. (*Wildman, Int. Law*, vol. 2, p. 345; *La Flore*, 5 Rob. Rep., p. 271; *The Marianne*, 5 Rob. Rep., p. 13; *The Sacra Familia*, 5 Rob. Rep., p. 362; *The San José*, 6 Rob. Rep., p. 244; *The Amitie*, 6 Rob. Rep., p. 268; *The Wanstead*, Ewd. Rep., p. 268.)

§ 24. Any misconduct or fraud on the part of the capturing vessel, intended to deceive another, in order to prevent her from taking part in a capture, is generally punished by admitting the claim of the latter to the benefit of joint captor. Thus, in the case of *The Herman Parlo*, the actual captor extinguished his lights in order to prevent other ships from seeing the chase or capture. In the case of *The Eendracht*, the captor hoisted American colors, and offered to protect the prize against the other vessels who were chasing



her; by this means, the actual capture was deferred till the other vessels were out of sight. In both these cases the claims to joint capture were admitted, although the claimants were not in sight when the capture took place. Moreover, in the latter case the claimants were awarded costs against the actual captor. Where two convoying ships were detached to reconnoitre two ships in sight, which turned out to be a British frigate and an enemy's vessel. The frigate signalled her number, but made no signal of an enemy's ship ahead, thereby causing the convoying ships to be recalled. He afterwards made the capture, and the convoying ships were admitted as joint captors, on account of her neglect to make the proper signal. So, where a non-commissioned schooner which had had an engagement with an enemy's vessel, and though beaten off, was still hanging upon her, was induced to sheer off by the actual captor coming up and hoisting French colors, the claim of the admiralty to joint capture for the schooner, was sustained by the prize court. (*Phillimore, On Int. Law*, vol. 3, § 389; *Wildman, Int. Law*, vol. 2, pp. 343, 344; *The Herman Parlo*, 3 Rob. Rep., p. 8; *The Eendrauyht*, 3 Rob. Rep., appen., p. 35; *The Spankler*, 1 Dod. Rep., p. 359; *The Waaksanheid*, 3 Rob. Rep., p. 1; *La Virginie*, 5 Rob. Rep., p. 124; *The Robert*, 3 Rob. Rep., p. 194.)

§ 25. The distribution of prize among joint captors is usually regulated by statute, but in cases where no statute exists, resort is had to the general rule of prize law established by the courts, which is, that joint captors share in proportion to their relative strength. And this relative strength is usually determined by the number of men on board the actual taker, and the ships assisting in the capture. The same rule seems applicable to the case of a joint capture by a public and private ship, whether the latter be commissioned or not; as also where an ally coöperates in the capture. (*Phillimore, On Int. Law*, vol. 3, § 402; *Bynkershoek, Quaest. Jur. Pub.*, lib. 1, cap. 18; *Roberts v. Hartley*, Doug. Rep., p. 311; *Duckwork v. Tucker*, 2 Taunt. Rep., p. 7; *The Dispatch*, 2 Gallis. Rep., p. 1; *The Twee Gesuster*, 2 Rob. Rep., p. 284, note; *Le Franc*, 2 Rob. Rep., p. 285, note.)

§ 26. The foregoing remarks respecting joint capture refer to benefit in prize; but some states also allow a bounty, or head

money, for the taking or destroying of vessels of the enemy. Such provision is made by the fifth section of the English prize act. As grants of this description are considered as made to reward immediate personal exertion, and, moreover, are *public grants*, the courts construe them with much more rigor than they do the conflicting claims of individuals for shares of prize money. In these, as in all other public grants, the presumption is in favor of the grantor, and against the grantee. Hence, all claims of constructive joint capture, as from sight, association in chase, etc., are rejected. Originally the reward was confined to actually combat only; but, it is now held, that where a capture can be considered as a continuation of a general action, the whole fleet is equally entitled to head money, notwithstanding the particular combat and formal taking or destroying by a single ship belonging to the fleet. It is otherwise where the capture is not the immediate consequence of the general action. In a general engagement there can be no distinction of combatants; the whole fleet is supposed to contend with the whole opposing force; it is often so in fact, and always so in supposition of the law. But if the capture is made under such circumstances as to destroy all supposition of a continuity of the general engagement, the court will pronounce against the claim of the fleet to share in the head money. (*Wildman, Int. Law*, vol. 2, pp. 321–326; *The Clarinde*, 1 Dod. Rep., p. 436; *La Gloire*, Edw. Rep., p. 280; *L'Alerte*, 6 Rob. Rep., p. 238, *The Ville de Varsovie*, 2 Dod. Rep., p. 301; *El Rayo*, 1 Dod. Rep., p. 42; *The Babilon*, Edw. Rep., p. 39; *L'Elise*, 1 Dod. Rep., p. 442; *The Dutch Schuyts*, 6 Rob. Rep., p. 48; *The Matilda*, 1 Dod. Rep., p. 367; *The San Joseph*, 6 Rob. Rep., p. 331; *The Uranie*, 2 Dod. Rep., p. 172; *La Francha*, 1 Rob. Rep., p. 157; *The Santa Brigada*, 3 Rob. Rep., p. 58; *The Bellone*, 2 Dod. Rep., p. 343.)

§ 27. In all cases of collusive captures, the captors, whether single or joint, acquire no title to the prize, and the captured property is condemned to the government. If collusion be alleged, the usual simplicity of the prize proceedings is departed from in order to discover the fraud, if any exist. Evidence invoked from other prize causes is sometimes resorted to, as proof of collusion. Thus, where the same

vessel has been proved guilty of collusion in another case, during the same cruise, the court will take cognizance of that fact in the claim before it. The British prize act (section twenty) provides for forfeiture in all cases of capture by collusion, or connivance, or consent, and any bond given by the captain or commander of the captured vessel, is, also, declared to be forfeited to the crown. But even without a statutory provision, the same result would follow from the general rules of maritime capture, for prize courts generally will decree forfeiture of the rights of prize against the captors for gross irregularity or fraud, or for any other criminal conduct. Although the capture may be a good prize, if there should prove to be fraud and collusion between the captors and the captured, the former will have forfeited their rights, and the property is condemned to the government generally. Forfeiture may, also, be declared in favor of the government for other acts of misconduct, and for willful and obstinate violation of duty on the part of the captors. (*Wildman, Int. Law*, vol. 2, pp. 298, et seq.; *Kent, Com. on Am. Law*, vol. 1, p. 359; *The Johanna Tholen*, 6 Rob. Rep., p. 72; *The George, etc.*, 1 Wheaton Rep., p. 408; *Oswell v. Vigne*, 15 East. Rep., p. 70; *The George*, 2 Wheaton Rep., p. 278; *The Experiment*, 8 Wheaton Rep., p. 261; *The Bothnea and The Jahnstoff*, 2 Wheaton Rep., p. 169; *Dalloz, Repertoire, verb. Prises Maritimes*, sec. 5.)

§ 28. So, in all cases of forfeiture of interest in the prize by the captors, the condemnation is to the government. The captor may forfeit his right of prize in various ways: as, by an unreasonable delay in bringing the question of prize or no prize to an adjudication by a competent court; by unnecessarily taking the captured vessel to a neutral port; by cruel treatment of the captured crew; by breaking bulk on board, except in case of necessity; by embezzlement; by breach of instructions, or any offense against the law of nations, etc. But irregularities on the part of captors, originating in mere mistake or negligence, which work no irreparable mischief, and are consistent with good faith, will not forfeit their right of prize. In order that a prize court may decree forfeiture or restitution, it is not necessary that the prize itself be brought within its jurisdiction; it is sufficient

that a proceeding be instituted by the claimants against the captor. Thus, if the prize be lost at sea, the court still has jurisdiction of the case, and may proceed to its adjudication at the instance of either the captors or the claimants. So, if captured property be converted by the captors, the jurisdiction of the prize court over the case continues; it may always proceed *in rem*, wherever the prize, or the proceeds of the prize, can be traced to the hands of any person whatever; and this it may do, notwithstanding any stipulation in the nature of bail had been taken for the property. But the court may exercise a sound discretion whether it will interfere in favor of the captors, in case the captured property has been unjustifiably or illegally converted, and in case the disposition of the captured vessel and crew has not been according to duty. "If no sufficient cause," says Chief Justice Taney, "is shown to justify the sale, and the conduct of the captor has been unjust and oppressive, the court may refuse to adjudicate upon the validity of the capture, and award restitution and damages against the captor; although the seizure as prize was originally lawful, or made upon probable cause. And the same rule prevails where the sale was justifiable, and the captor has delayed, for an unreasonable time, to institute proceedings to condemn it. Upon a libel filed by the captured, as for a marine trespass, the court will refuse to award a monition to proceed to adjudication on the question of prize or no prize, but will treat the captor as a wrongdoer from the beginning." (*Wildman, Int. Law*, vol. 2, pp. 298, 299; *Kent, Com. on Am. Law*, vol. 1, pp. 358, 359; *The Susannah*, 6 Rob. Rep., p. 48; *The Falcon*, 6 Rob. Rep., p. 194; *L'Ecole*, 6 Rob. Rep., p. 220; *La Dame Cecile*, 6 Rob. Rep., p. 257; *The Pomona*, 1 Dod. Rep., p. 25; *The Arabella and Madeira*, 1 Gallis. Rep., p. 368; *Jecker, et al. v. Montgomery*, 13 Howard Rep., p. 516; *British Prize Act*, sec. 30; *Dalloz, Repertoire, verb. Prises Maritimes*, sec. 5.)

§ 29. *Probable cause* of seizure is, by the general usage of nations and the decisions in admiralty, a sufficient excuse in cases of capture *de jure belli*, and this question belongs exclusively to the court, which has jurisdiction to restore or condemn. The general principles which govern cases of this character, are embodied in the statute laws of the United

States. The act of June 26th, 1812, section six, provides that the courts of the United States in which the case may be finally decided, "shall and may decree restitution, in whole or in part, when the capture shall have been made without *just cause*; and if made without *probable cause*, or otherwise unreasonably, may order and decree damages and costs to the party injured." If there be a reasonable suspicion, it is proper to make the capture, and submit the cause for adjudication before the proper tribunal, and, although the court should acquit without the formality of further proof, the captors will be justifiable, by reason of such probable cause; but where the seizure is wholly without excuse, they are liable for costs, and for the damages which ensue from the seizure, and such damages and costs will be decreed to the party injured. The liability of the captor for damages and costs, depends, in general, upon his good faith and intentions; a court will seldom impose damages for a mere error of judgment, unless the irregularity is very gross, and works a serious injury to the claimants. They are never responsible for the neglect or error of the captured vessel. Thus, if a vessel, although not liable to condemnation, has defective documents on board, or does not show proper papers, the captor is not liable for either costs or damages, but, on the contrary, the court will generally allow him costs and expenses, to be paid by the claimants to whom the restitution is made. But, if he unreasonably delay to procure an adjudication, or is otherwise guilty of negligence or bad faith, he is liable for costs and damages. The owners of captured property, which is lost through the fault or negligence of the captors, are entitled to compensation in damages, and the value of the vessel, cost of cargo, with all charges, and the premium of insurance if paid, are allowed in ascertaining the amount of damages. Where a ship was justifiably captured, but not liable to be condemned, was lost by the culpable negligence of the prize-master, restitution in the value of ship and freight was decreed. Where freight is decreed, it is to be estimated on the footing of a fair commercial profit. A captor is liable for demurrage, in all cases of unjustifiable delay; for sending his prize into an inconvenient port; for loss of the ship if he refuses to take a pilot, but not where there is a regular pilot

on board; for deficiency of cargo; but not, without negligence or misconduct, for goods stolen from a warehouse after commission of unlivery. All claims to costs and damages are extinguished by accepting an unconditional release of the vessel. (*Wildman, Int. Law*, vol. 2, pp. 153–177; *U. S. Statutes at Large*, vol. 2, p. 761; *The Palmyra*, 12 Wheaton Rep., p. 1; *The George*, 1 Mason Rep., p. 24; *Locke v. The U. S.*, 7 Cranch. Rep., p. 339; *Shattuck v. Maley*, 1 Wash. Rep., p. 245; *Jecker, et al., v. Montgomery*, 13 Howard Rep., p. 505; *Bello, Derecho Internacional*, pt. 2, cap. 5, § 5.)

§80. Questions with respect to the liability of admirals of fleets, and commanders of squadrons, for captures made by vessels and officers under their commands, and of owners of privateers for the acts of their captains, have often been adjudicated upon by the courts. The commander of a squadron, or the admiral of a fleet, is liable to individuals for the trespasses of those under his command, in case of actual presence and coöperation, or of positive orders. Where, in such cases, the capture has actually taken place, the prize-master is considered as a bailee to the use of the whole fleet or squadron, who are to share in the prize money, and thus the commander may be made responsible; but not so as to mere trespasses, unattended with a conversion to the use of the fleet or squadron. With respect to *costs and damages*, it is a general rule in relation to public ships, that the actual wrong-doer, and he alone, is responsible. It is not meant by this that the crew of the capturing ship are responsible for a seizure made in obedience to the commands of their superior; but that the person actually ordering the seizure is the one to be held liable for costs and damages. Thus, the commander of a single vessel is liable for the acts of all under his command, and the commander of a fleet or squadron, in case of actual presence and coöperation, or of positive orders. In the United States he is also held responsible for acts done under his *permissive* orders; but not so in England. The captain, there, must be looked to as the actual wrong-doer, and the admiral is responsible to him if he has given express orders for the particular seizure. (*Kent, Com. on Am. Law*, vol. 1, p. 100; *Phillimore, On Int. Law*, vol. 3, § 457; *The Mentor*, 1 Rob. Rep., p. 177; *The Diligentia*, 1 Dod. Rep., p. 404; *The Eleanor*, 2 Wheaton Rep., p. 346.)

§ 31. In the case of privateers, the owners, as well as the masters, are responsible for the damages and costs occasioned by illegal captures, and this to the extent of the actual loss and injury, even if it exceed the amount of the bond usually given upon the taking out of the commission. But such owners who are only constructively liable, are not bound to the extent of vindictive damages, although the original wrongdoers, in case of gross and wanton outrage in an illegal seizure, may be made responsible beyond the loss actually sustained. The sureties to the bond are responsible only to the extent of the sum in which they are bound. But, if a person appear on behalf of the captain of a privateer, and give security in his own name as principal in the stipulation, with other sureties, he is liable, in the same manner as the captain, as principal. A part owner of a privateer is not exempted from being a party to the suit, in consequence of having made compensation for his share to the claimant and received a release from him. A person may be holden a part owner of a privateer, although his name has never been inserted in the bill of sale or in the ship's register. (*Dalloz, Répertoire, verb. Prises Maritimes*, sec. 2, art. 3; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 13; *Brown, Civil and Adm. Law*, vol. 2, p. 140; *Phillimore, On Int. Law*, vol. 3, § 458; *Bynkershoek, Quaest. Jur. Pub.*, lib. 1, cap. 19; *Pothier, De Propriété*, No. 92; *Valin, sur l'Ordonnance*, liv. 3, tit. 9.; *Talbot v. Three Brigs*, 1 Dal. Rep., p. 95; *The Die Fire Damer*, 5 Rob. Rep., p. 318; *The Der Mohr*, 3 Rob. Rep., p. 129; *The Gerolama*, 3 Hagg. Rep., p. 187; *Del Col. v. Arnold*, 3 Dall. Rep., p. 333; *The Anna Maria*, 2 Wheaton Rep., p. 327; *King v. Ferguson*, Edw. Rep., p. 84; *The Karasan*, 5 Rob. Rep., p. 260; *The William*, 4 Rob. Rep., p. 214; *Bello, Derecho International*, pt. 2, cap. 5, § 5; *Code de Commerce*, liv. 2, tit. 3, art. 217; *Bedarride, Droit Com.*, §§ 300, et seq.)

§ 32. It is the duty of the prize master, immediately on his arrival in port, to institute proceedings in the proper court for the adjudication of his prize. He should also deliver over to the commissioner, or proper officer of the court, all the papers and documents found on board, and, at the same time, make affidavit that they are delivered up as taken, without fraud, addition, subdivision or embezzlement. He

should also have the master and principal officers, and some of the crew, of the captured vessel, brought in for examination. This examination should take place as soon as possible after the arrival of the vessel. Prize-masters are considered as bailees to the use of the captors, who are to share in prize money. If the prize be lost by the misconduct of the prize-master, or for neglecting to take a pilot, or to put on board a proper prize-crew, the captors are held responsible. So, also, in claims for demurrage in not bringing in the prize in due time, or neglecting to have the case adjudicated before a competent court. Courts of prize have jurisdiction of all prize agents, and determine upon the legality of their appointment, and the disposition which they may make of the proceeds of sales of prizes, etc. If they pay such proceeds over to the captors without an order of the court, they are responsible to the owners of the captured property for the net amounts so received by them, in case restitution is received. The duties and responsibilities of prize-agents, where not regulated by statutes, are usually determined by the rules and orders of the courts. (*Bello, Derecho Internacional*, pt. 2, cap. 5, § 5; *Phillimore, On Int. Law*, vol. 3, §§ 472, et seq.; *The Der Mohr*, 3 Rob. Rep., p. 129; *The Speculation*, 2 Rob. Rep., p. 293; *The William*, 6 Rob. Rep., p. 316; *Del. Col. v. Arnold*, 3 Dall. Rep., p. 333; *Wilcox v. U. Ins. Co.*, 2 Binn. Rep., p. 574; *Home v. Camden*, 1 H. Black. Rep., pp. 374, 524; *Willis v. Commissioners*, 5 East. Rep., p. 22; *The Noysomhed*, 7 Ves. Rep., p. 593; *Smart v. Wolff*, 3 Durn. and East. Rep., p. 323; *The Pomona*, 1 Dod. Rep., p. 25; *The Herkimer*, Stew. Rep., p. 328; *The Louis*, 5 Rob. Rep., p. 146; *The Polly*, 5 Rob. Rep., p. 147, note; *The Printz Henrick*, 6 Rob. Rep., p. 95; *The Exeter*, 1 Rob. Rep., p. 173; *The Princessa*, 2 Rob. Rep., p. 31; *The St. Lawrence*, 2 Gallis. Rep., p. 19; *The Brutus*, 2 Gallis. Rep., p. 526; *Bingham v. Cabot*, 3 Dallas Rep., p. 19; *Kean v. Brig Gloucester*, 2 Dall. Rep., p. 36; *Hill v. Ross*, 3 Dall. Rep., p. 331; *Penhallow v. Doane*, 3 Dall. Rep., p. 54.)



## CHAPTER XXXI.

## PRIZE COURTS, THEIR JURISDICTION AND PROCEEDINGS.

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§ 1. It has been shown elsewhere, that in war on land, the title to personal and movable property is considered as lost to the owner as soon as the captor has acquired a *firm possession*, which, as a general rule, is considered as taking place after a lapse of *twenty-four hours*; but, that this rule does not, at least in Great Britain and the United States, apply to maritime captures, which are held in abeyance till the legality of the capture is determined by some court of competent jurisdiction. A different principle, however, is applied in

case of the recapture of property of the continental nations of Europe, who adhere to the old rule of *perductio infra prae-sidia*, or of reclamation *ante occasum solis*. Kent, and other modern writers of authority, contend for the absoluteness of the rule, as one fully established by usage and incorporated into the code of international jurisprudence, that, "the property is not changed in favor of the neutral vendee or recaptor, so as to bar the original owner, until a regular sentence of condemnation has been pronounced by some court of competent jurisdiction, belonging to the sovereign of the captor; and the purchaser must be able to show documentary evidence of that fact to support his title." Such is undoubtedly the practice of Great Britain and the United States, but with respect to recaptures, it is by no means universal, some states retaining the ancient practice, and others adopting the rule of reciprocity. But this question will be particularly considered under the head of recaptures. (*Kent, Com. on Am. Law*, vol. 1, pp. 101, 102; *Bello, Derecho Internacional*, pt. 2, cap. 5, § 4; *Wheaton, Elem. Int. Law*, pt. 4, ch. 2, §§ 11, 12; *Dalloz, Repertoire, verb. Prises des Maritimes*; *Willman, Int. Law*, vol. 2, pp. 277–280; *Phillimore, On Int. Law*, vol. 3, §§ 407, et seq.; *Grotius, de Jur. Bel. ac Pac.*, lib. 3, cap. 6, § 3; *Bynkershoek, Quaest. Jur. Pub.*, lib. 1, cap. 5; *Valin, Comm. sur l'Ordonnance*, liv. 3, tit 9, § 8; *Pistoye et Duverdy, Des Prises*, tits. 7, 8.)

§ 2. The validity of a maritime capture must be determined by a prize court of the government of the captor, and cannot be adjudicated by the court of any other country. The reason of this rule is based upon the responsibility which the law of nations imposes upon the government of the captor in case of unlawful condemnation of the captured property. If the court of any country other than that of the captor were to condemn, the government of the captor could not be held responsible to the government whose citizen is unlawfully deprived of his property. This rule necessarily excludes the jurisdiction of a prize court of an ally over captures made by his co-belligerent. The government of the captor is held responsible to other states for the acts of his own subjects, but not for those of his allies. It is, therefore, evident that the courts of an ally cannot deter-

mine whether captured property shall be restored to the original owner, or whether the captor's government shall assume the responsibility of its condemnation. Mr. Phillimore asserts, that the question of prize may be adjudicated in "the court of the captor or of his ally," on the ground that *unam constituunt civitatem*; but none of the authorities to which he refers support his position; they refer to the *locality* of the prize when condemned, or to the *place* where the court was sitting at the time of condemnation, but not to the origin of the court itself; in none of the cases to which he refers was it held that the *court* of an ally may condemn. On the contrary, Chancellor Kent says distinctly, "The prize court of an ally *cannot* condemn;" and Mr. Wheaton is equally distinct and emphatic: "Where the property is carried into the port of an ally, there is nothing to prevent the government of the country, *although it cannot itself condemn*, from permitting the exercise of that final act of hostility, etc." For the same reason, the condemnation of a capture cannot be pronounced in the prize court of a neutral; for, as the government of the captor is answerable to other states for such condemnation, it is proper that it should be made by its own courts. Moreover, if the courts of neutral countries were allowed to determine such questions, their decisions would inevitably involve their respective governments in hostilities with one or the other of the belligerent parties, or with other neutral states, the property of whose citizens might be condemned for some violation of neutral duties. Their exclusion rests not only on the fact that the exercise of this authority would be inconsistent with the neutral character, but also, on the well established practice and usage of nations. (*Kent, Com. on Am. Law*, vol. 1, p. 103; *Wheaton, Elem. Int. Law*, pt. 4, ch. 2, §§ 13, 16; *Phillimore, On Int. Law*, vol. 3, §§ 365, et seq.; *Manning, Law of Nations*, pp. 379-390; *Hubner, de la Saisie des Batimens, etc.*, liv. 1, ch. 11, § 8; *Martens, Precis du Droit des Gens*, liv. 8, ch. 7, § 312; *D'Hauterive and De Cussy, Traité de Commerce*, t. 9, p. 375; *Pistoye et Duxerdy, Des Prises*, tit. 8; *The Flad Oyen*, 1 Rob. Rep., p. 135; *The Perseverance*, 2 Rob. Rep., p. 240; *The Kierlighett*, 3 Rob. Rep., p. 95; *Havelock v. Rockwood*, 8 Durn. and East Rep., p. 268; *Donaldson v. Thompson*, 1 Cowp. Rep., p. 429; *The*

*Invincible*, 2 Gallis. Rep., p. 28; 1 Wheaton Rep., p. 238; *Maissonnaire v. Keating*, 2 Gallis. Rep., p. 224; *The Finlay and William*, 1 Peters Rep., p. 12; *Wheelwright v. Depeyster*, 1 Johns. Rep., p. 471; *Page v. Lenox*, 15 Johns. Rep., p. 172; *Bello, Derecho Internacional*, pt. 2, cap. 5, § 4; *Heffler, Droit International*, § 172; *Hautefeuille, Des Nations Neutres*, tit. 12, ch. 2; *Dalloz, Repertoire, verb. Prises Maritimes*, sec. 6; *Pouget, Droit Maritime*, tome 1, app.)

§ 8. There are two apparent exceptions to this exclusive jurisdiction of the prize courts of the captor's country over questions of prize; *first*, where the capture is made within the territory of a neutral state, and *second*, where it is made by a vessel fitted out within the territory of the neutral state. In either of these cases, the judicial tribunals of such neutral state have jurisdiction to determine the validity of captures so made, and to vindicate its own neutrality by restoring the property of its own subjects, or of other states in amity with it. "A neutral nation," says the supreme court of the United States, "which knows its duty, will not interfere between belligerents, so as to obstruct them in the exercise of their undoubted right to judge, through the medium of their own courts, of the validity of every capture made under their respective commissions, and to decide on every question of prize law which may arise in the progress of such discussion. But it is no departure from this obligation, if, in a case in which a captured vessel be brought, or voluntarily comes, *infra prasidia*, the neutral nation extends its examination so far as to ascertain whether a trespass has been committed on its own neutrality by the vessel which has made the capture. So long as a nation does not interfere in the war, but professes an exact impartiality toward both parties, it is its duty, as well as right, and its safety, good faith and honor demand of it, to be vigilant in preventing its neutrality from being abused, for the purpose of hostility against either of them. \* \* \* In the performance of this duty, all the belligerents must be supposed to have an equal interest; and a disregard, or neglect of it, would inevitably expose a neutral nation to the charge of insincerity, and to the just dissatisfaction and complaints of the belligerent, the property of whose subjects should not,

under such circumstances, be restored." These are not, properly considered, exceptions to the general rule of prize jurisdiction, but are cases where the courts of a neutral state are called upon to interfere for the purpose of maintaining and vindicating its neutrality. (*Dalloz, Repertoire, verb. Prises Maritimes*, sec. 6; *Pistoye et Duverdy, Des Prises*, tit. 8; *Wheaton, Elem. Int. Law*, pt. 4, ch. 2, § 14; *The Estrella*, 4 Wheaton Rep., p. 298; *The Santissima Trinidad*, 7 Wheaton Rep., p. 284; *L'Invincible*, 1 Wheaton Rep., p. 238; *La Amistad de Rues*, 5 Wheaton Rep., p. 385; *Brig Alert and Cargo v. Blas Moran*, 9 Cranch. Rep., p. 359; *La Concepcion*, 6 Wheaton Rep., p. 235; *Talbot v. Jansen*, 3 Dallas Rep., p. 133; *Billo, Derecho Internacional*, pt. 2, cap. 5, § 4; *Heffter, Droit International*, § 172; *Hautefeuille, Des Nations Neutres*, tit. 12, ch. 2.)

§ 4. Attempts have been made by some states to give to their own tribunals prize jurisdiction of all captured property brought within their territorial limits. Such a municipal regulation was made by France, in 1681, and its justice was defended on the ground of compensation for the privilege of asylum granted to the captor and his prizes in a neutral port. "There can be no doubt," says Mr. Wheaton, "that such a condition may be annexed by the neutral state to the privilege of bringing belligerent prizes into its ports, which it may grant or refuse, at its pleasure, provided it be done impartially to all the belligerent powers; but such a condition is not implied in a mere general permission to enter the neutral ports. The captor who avails himself of such a permission, does not thereby lose the military possession of the captured property, which gives to the prize courts of his own country exclusive jurisdiction to determine the lawfulness of the capture. \* \* \* The claim of any neutral proprietor, even a subject of the state into whose ports the captured vessel or goods may have been carried, must, in general, be asserted in the prize court of the belligerent country, which alone has jurisdiction of the question of prize or no prize."

*Wheaton, Elem. Int. Law*, pt. 4, ch. 2, § 14; *Valin, Comm. sur l'Ord.*, liv. 3, tit. 9; *Lampredi, Commerce des Neutres*, pt. 1, § 14; pt. 2, No. 3; *Phillimore, On Int. Law*, vol. 3, § 366; *Pistoye et Duverdy, Des Prises*, tit. 8; *Manning, Law of*

*Nations*, p. 380; *Bello, Derecho Internacional*, pt. 2, cap. 5, § 4; *Heffter, Droit International*, § 172; *Hautefeuille, Des Nations Neutres*, tit. 12, ch. 2; *Dalloz, Répertoire, verb. Prises Maritimes*, sec. 6.)

§ 5. The rule has sometimes been varied by treaty stipulations. Thus, in the treaty between the United States and the Republic of Columbia in 1825, art. 21, and between the United States and Chile in 1832, art. 21, it was agreed that the established courts for prize cases in the country to which the prizes may be conducted, should alone take cognizance of them. But it must be observed that such stipulations can bind only those who make the engagements. The courts of neutral states would not be bound to exercise such jurisdiction, nor could states not parties to the treaty be debarred from claiming the right of trial by their own prize courts, which alone, under the general law of nations, have jurisdiction of prize causes. (*U. S. Statutes at Large*, vol. 8, pp. 316, 439; *Kent, Com. on Am. Law*, vol. 1, p. 104, note; *Phillimore, on Int. Law*, vol. 3, § 865; *Manning, Law of Nations*, p. 388; *Bello, Derecho Internacional*, pt. 2, cap. 5, § 4.)

§ 6. There is evidently a wide distinction between the ordinary municipal tribunals of the state, proceeding under the municipal laws as their rule of decision, and prize tribunals appointed by its authority, and professing to administer the law of nations to foreigners as well as subjects. "The ordinary municipal tribunals," says Wheaton, "acquire jurisdiction over the person or property of a foreigner, either *expressed* by his voluntarily bringing the suit, or *implied* by the fact of his bringing his person or property within the territory. But when courts of prize exercise their jurisdiction over vessels captured at sea, the property of foreigners is brought by force within the territory of the state by which those tribunals are constituted. By natural law, the tribunals of the captor's country are no more the rightful exclusive judges of captures in war, made on the high seas from under the neutral flag, than are the tribunals of the neutral country. The equality of nations would, on principle, seem to forbid the exercise of a jurisdiction thus acquired by force and violence, and administered by tribunals which cannot be impartial

between the litigating parties, because created by the sovereign of the one to judge the other. Such, however, is the actual constitution of the tribunals in which, by the positive international law, is vested the exclusive jurisdiction of prizes taken in war." From this evident and wide distinction between ordinary cases of litigation, under municipal law, and the condemnation of maritime captures, under the law of nations, there has resulted the rule that no court can have prize jurisdiction unless it be expressly made a prize tribunal by the authority of the State to which it belongs. But, the organization of the court, and the manner of exercising this jurisdiction, must depend upon the constitution and local laws of each state, and are different in different countries. (*Kent, Com. on Am. Law*, p. 103; *Wheaton, Elem. Int. Law*, pt. 4, ch. 2, § 13; *Jecker et al. v. Montgomery*, 13 Howard Rep., p. 515; *Phillimore, on Int. Law*, vol. 3, §§ 437, et seq.; *Lindo v. Rodney*, Doug. Rep., pp. 613-616; *Hautefeuille, Des Nations Neutres*, tit. 2, ch. 2, sec. 2; *Dalloz, Repertoire, verb. Prises Maritimes*, sec. 6; *Pistoye et Duverdy, Des Prises*, tit. 8; *Elphinstone v. Bedreechand*, Knapp Rep., pp. 360, 361.)

§ 7. The English court of admiralty is divided into two distinct tribunals, one of which is called the *instance court*, and the other the *prize court*; the former having generally all the jurisdiction of the admiralty, except in prize cases, and the latter, acting under a special commission, distinct from the usual commission given to judges of the admiralty, to enable the judge, in time of war, to assume the jurisdiction of prizes. "The manner of proceeding," says Lord Mansfield, "is totally different. The whole system of litigation and jurisprudence in the prize court is peculiar to itself; it is no more like the court of admiralty than it is to any other court in Westminster Hall." "The courts of Westminster Hall never have attempted to take cognizance of the question, *prize or no prize*; not from the locality of being done at sea, as I have said, but from their incompetence to embrace the whole of the subject." (*Kent, Com. on Am. Law*, vol. 1, pp. 353, 354; *Brown, Civil and Adm. Law*, chs. 4, 5; *Lindo v. Rodney*, Doug. Rep., pp. 613, 616;

*Ex parte Lynch*, 1 Maddock Rep., p. 15; *Phillimore, on Int. Law*, vol. 3, § 439.)

§ 8. The constitution of the United States extends the judicial power, "to all cases of admiralty and maritime jurisdiction." Under the general head of *admiralty jurisdiction*, are included all captures and questions of prize, arising *jure belli*, as well as acts, torts and inquiries strictly of civil cognizance, independent of belligerent operations and contracts, claims and services, purely maritime, and rights and duties appertaining to commerce and navigation. Prize jurisdiction, therefore, as a branch of admiralty, belongs to the federal courts. "It is obvious upon the slightest consideration," says Story, "that cognizance of all questions of prize, made under the authority of the United States, ought to belong exclusively to the national courts. How, otherwise, can the legality of the captures be satisfactorily ascertained, or deliberately vindicated? It seems not only a natural, but a necessary appendage to the power of war, and negotiation with foreign nations. It would otherwise follow, that the peace of the whole nation might be put at hazard at any time, by the misconduct of one of its members." The district courts of the United States, as courts of *admiralty*, are *prize courts* as well as *instance courts*. Their *prize jurisdiction*, however, was originally much questioned, on the ground that it was not an ordinary inherent branch of *admiralty jurisdiction*, but an extraordinary power, requiring, as in England, a special commission on the breaking out of war, to call it into action. This question in 1794, came up directly to the supreme court of the United States, and it was decided by the unanimous opinion of the judges, "that every district court of the United States, possesses all the powers of a court of admiralty, whether considered as an *instance* or a *prize court*." This decision was reëffirmed in other cases, and the jurisdiction claimed, was expressly sanctioned by the prize act of June 26th, 1812. The district courts of the United States are therefore *prize courts of admiralty*, possessing all the powers incident to their character as such under the law of nations. (*Conkling, Treatise, etc.*, p. 135; *Glass, et al. v. The Sloop Betsey, et al.*, 3 Dallas Rep., p. 6; *Kent. Com. on Am. Law*, vol. 1, p. 355; *Story, On the Constitution*, b. 2, ch. 38, § 866.)



§ 9. It has also been decided by the supreme court, that neither the President of the United States, nor any officer acting under his authority, can give prize jurisdiction to courts not deriving their authority from the constitution or laws of the United States. The alcalde of Monterey, a port of Mexico, in the possession and military occupation of the United States, as conquered territory, was appointed by the governor of California as a judge of admiralty with prize jurisdiction, and the appointment was ratified by the president, on the ground that prize crews could not be spared from the squadron to bring captured vessels into a port of the United States. The supreme court held that such a court could not decide upon the rights of the United States, or of individuals, in prize cases, nor administer the laws of nations; that its sentence of condemnation was a mere nullity, and could have no effect upon the rights of any party. (*Wharton, Elem. Int. Law*, pt. 4, ch. 2, § 18, note a; *Jecker, et al. v. Montgomery*, 18 Howard Rep., p. 498.)

§ 10. Having shown that the prize court of the captor's country has exclusive jurisdiction of the question of prize or no prize, and that no mere municipal court can exercise such jurisdiction, unless it is especially conferred by the constitution or local laws of the state to which it belongs; we now come to the inquiry where such court may sit or exercise its authority. We have already seen that the prize court of an ally cannot condemn; but may not the prize court of the captor sit in the territory of an ally? The objections made to the jurisdiction of an ally's court, do not apply to a court belonging to the country of the captor sitting in an ally's territory. Hence, Chancellor Kent says, that such court, so sitting, may lawfully condemn. It has also been held by the English courts, that a prize carried into a state in alliance with the captors, and at war with the country to which the captured vessel belongs, may be legally condemned there by a consul belonging to the nation of the captors, or in to the country of the captors. It was at one time supposed, that the authority of the *Flad Oyen*, was against the legality of such a condemnation, but Sir William Scott, subsequently pointed out and explained the distinction. (*Abbot, On Shipping*, Amer. Ed. 1846, p. 33; *Phillimore, On Int. Law*, vol. 3, §§ 365,

et seq.; *Wheaton, Elem. Int. Law*, pt. 4, ch. 2, § 13; *Kent, Com. on Am. Law*, vol. 6, p. 108; *The Flad Oyen*, 1 Rob. Rep., p. 185; *The Christopher*, 2 Rob. Rep., p. 209; *The Harmony*, 2 Rob. Rep., p. 210, note; *The Adelaide*, 2 Rob. Rep., p. 210, note; *The Betsey Kruger*, 2 Rob. Rep., p. 210, note; *Oddy v. Bovill*, 2 East. Rep., p. 473; *Wheelwright v. Depeyster*, 1 Johns. Rep., p. 471; *Hautefeuille, Des Nations Neutres*, tit. 12, ch. 2; *Pistoye et Dwerdy. Des Prises* tit. 8; *Dalloz, Répertoire, verb. Prises Maritimes*, sec. 6.)

§ 11. But a prize court of the captors cannot sit in a neutral territory, nor can its authority be delegated to any tribunal sitting in neutral territory. The reason of this rule is obvious. Neutral ports are not intended to be auxilliary to the operations of the belligerents, and it is not only improper but dangerous to make them the theatre of hostile proceedings. A sentence of condemnation by a belligerent prize court in a neutral port is, therefore, considered insufficient to transfer the ownership of vessels or goods captured in war, and carried into such port for adjudication. This question was first decided by the supreme court of the United States in 1794, and in 1799 it was reëxamined and discussed at much length by Sir William Scott, who decided that an enemy's prize court in neutral territory, could not lawfully condemn. (*Kent, Com. on Am. Law*, vol. 1, p. 103; *Glass et al., v. The Sloop Betsey, et al.*, 3 Dallas Rep., p. 6; *The Flad Oyen*, 1 Rob. Rep., p. 136; *The Henrick and Maria*, 4 Rob. Rep., p. 45; *Wheaton, Elem. Int. Law*, pt. 4, ch. 2, § 13; *Hautefeuille, Des Nations Neutres*, tit. 12, ch. 2.)

§ 12. The objections made to the establishment of a prize court in neutral territory would not apply to conquered territory in the possession and military occupation of the captors. Such territory is *de facto* within the jurisdiction of the conqueror, and a condemnation regularly made by a prize court legally established in such conquered territory would not be set aside for that reason alone. The *legality* of the court may, however, be a question of some difficulty, and must be determined by the constitution and local laws of the captor's country. It will, hereafter, be shown that, in this respect, the laws of different countries are very different; that the laws

of Great Britain instantly extend over conquered territory; but, that territory in the military occupation of the United States is not a part of the federal union; that when the conquest is confirmed, the inhabitants of such territory become entitled to the rights, privileges, and immunities guaranteed by the constitution, but that the action of congress is requisite to extend the general laws of the United States over territory, even after cession or confirmation of conquest. It has already been shown that neither the executive nor military authorities of the United States have power to establish prize courts in conquered territory to administer the law of nations. But, it is different with Great Britain; for, as the limits of the empire are extended, *ipso facto*, by the conquest, and as the conquered territory becomes instantly a dominion of the crown, the king, who issues prize commissions of his own authority, may erect courts there for the exercise of such jurisdiction. In speaking of the island of Heligoland, which had been taken possession of by British forces, but had not been confirmed to Great Britain by a treaty of peace, Sir William Scott remarked: "It might have erected a court there, for the exercise of admiralty jurisdiction; and, if it did not, I presume it refrained from so doing because it was not thought that the public convenience required it. The enemy certainly had no right to say that a court of that kind should not be there erected. (*Jecker, et al. v. Montgomery*, 18 Howard Rep., p. 515; *Cross, et al. v. Harrison*, 16 Howard Rep., p. 165; *The Flotina*, 1 Dod. Rep., p. 452.)

§ 13. The ordinary prize jurisdiction of the admiralty extends to all captures in war made on the high seas; to captures made in foreign ports and harbors; to captures made on land by naval forces; to surrenders made to naval forces alone, or acting conjointly with land forces; to captures made in rivers, creeks, ports and harbors of the captor's own country in time of war, and to seizures, reprisals and embargoes, in anticipation of war. It also extends to all ransom bills upon captures; to money received as a ransom, or commutation on a capitulation to naval forces, alone or jointly with land forces; in fine, to all uses of maritime capture arising *jure belli*, and to all matters incidental thereto. Prize courts also have exclusive jurisdiction and an enlarged dis-

cretion, as to allowance of freight, damages, expenses and costs, and as to all torts, personal injuries, ill-treatments, and abuse of power, connected with maritime captures *de jure belli*, and they frequently award large and liberal damages in such cases. This rule rests upon the ground that where the prize court has the sole and exclusive jurisdiction of the original matter, it ought also to have such jurisdiction of all its consequences, and of every thing necessarily incidental thereto. It is, therefore, held in England that the courts of common law can have no jurisdiction at all of such incidental questions, and this doctrine has been re-affirmed by the courts of the United States. Indeed, so far as questions have been decided by the federal courts of the United States, they have claimed and exercised a jurisdiction equally as ample and extensive as the prize courts of Great Britain. All cases of recapture are held to be cases of prize, and are to be proceeded with as such. It is understood in England that the admiralty, merely by its own inherent powers, never exercise jurisdiction of captures, or seizures as prize, made on shore without the coöperation of naval forces. Such were the views of Lord Mansfield, and his opinion on this point was adopted by Sir William Scott. As before remarked, we know of no decision by the courts of the United States bearing directly upon the question; in the case of *The Emulous*, although the court gave no opinion as to the right of the admiralty to take cognizance of mere captures made on the land, exclusively by land forces, yet it was declared to be very clear, that its jurisdiction was not confined to captures *at sea*. But prize courts do not, in general, take jurisdiction of questions of mere *booty*. If, however, the jurisdiction of a prize court has once attached, that is, if the capture be such as to bring it within the jurisdiction of the admiralty, the process of the prize court will follow the goods on shore, and its jurisdiction still continues, not only over the capture, but also over all questions incident to it. So, also, if the prize should be unwarrantably carried into a foreign port and there given up by the captors on security. In this respect the prize court holds a firmer jurisdiction than the instance court; for, in cases of wreck and derelict, if the goods are once on shore or landed, the cognisance of the common law

attaches. (*Kent, Com. on Am. Law*, vol. 1, p. 35, § 358; *The Peacock*, 4 Rob. Rep., p. 185; *The Two Friends*, 1 Rob. Rep., pp. 237, 238; *The Emulous*, 1 Gallis. Rep., p. 563; *Phillimore, On Int. Law*, vol. 3, §§ 126, et seq.; *Elphinstone v. Bedreechand*, Knapp Rep., p. 316.)

§ 14. The next question for consideration, is the locality of the captured property. If it be carried into a port of the captor's country, there can be no doubt respecting the jurisdiction of the prize court of the same country. But what particular tribunal of that country shall exercise the prize jurisdiction of a particular case, will depend, of course, upon the local laws under which such tribunals are organized, and their respective jurisdictions are assigned and limited. This is entirely a question of local law. So, also, if the captured property is carried into a port of the captor's co-belligerent, it may be adjudicated by a properly constituted prize tribunal of the captor's country; for, although the government of an ally cannot itself condemn, there is nothing to prevent it from permitting the exercise of that final act of hostility on the part of its co-belligerent, the condemnation of property captured in a common war. "There is a common interest," says Wheaton, "between the two governments, and both may be presumed to authorize any measures conducing to give effect to their arms, and to consider each other's ports as mutually subservient. Such an adjudication is, therefore, sufficient in regard to property taken in the course of the operations of a common war." It was at one time supposed that a prize court, though sitting in the country of its own sovereign, or of his ally, had no jurisdiction over prizes lying in a neutral port. Sir William Scott admitted that, on principle, the exercise of such jurisdiction was irregular, as the court wanted that possession which was deemed essential in a proceeding *in rem*; but he considered that the English admiralty had gone too far in its practice, to be recalled to the original principle. Sir William Grant, in delivering the judgment of the court of appeals, in the same case, expressed the same opinion, and the English rule is now considered as definitively settled. The supreme court of the United States has followed the English rule, and has held valid the condemnations, by a belligerent court, of prizes carried into a

neutral port and remaining there, the practice being justifiable on the ground of convenience to belligerents, as well as neutrals; and though the prize was, in fact, within neutral territory, it was still to be deemed under the control, or *sub potestate*, of the captor, whose possession is considered as that of his sovereign. It may, also, be remarked, that the rule thus established by the highest courts of England and the United States, is sanctioned by the practice of France, Spain, and Holland. But several French publicists deny its legality. For the same reason that a prize court of the captor may condemn captured property while in a neutral port, it may condemn such property situate in any foreign port, which is in the military possession of the captor. "As a general rule," says Chief Justice Taney, delivering the opinion of the supreme court, "it is the duty of the captor to bring it within the jurisdiction of the prize court of the nation to which it belongs, and to institute proceedings to have it condemned. This is required by the act of congress, in cases of capture by ships of war of the United States; and this act merely enforces the performance of a duty imposed upon the captor by the law of nations, which, in all civilized countries, secures to the captured a trial in a court of competent jurisdiction, before he can be finally deprived of his property. But there are cases where, from existing circumstances, the captor may be excused from the performance of this duty, and may sell, or otherwise dispose of, the property, before condemnation. And where the commander of a national ship cannot, without weakening inconveniently the force under his command, spare a sufficient prize crew to man the captured vessel, or where the orders of his government prohibit him from doing so, he may lawfully sell or otherwise dispose of the captured property in a foreign country, and may afterwards proceed to adjudication in a court of the United States." (*Bynkershoek, Quaest. Jur. Pub.*, lib. 1, cap. 5; *Wheaton, Hist. Law of Nations*, p. 321; *Manning, Law of Nations*, p. 382; *Kent, Com. on Am. Law*, vol. 1, pp. 103, 358; *Wheaton, Elem. Int. Law*, pt. 4, ch. 2, § 13; *Jecker, et al., v. Montgomery*, 13 Howard Rep., p. 516; *The Peacock*, 4 Rob. Rep., p. 185; *Hudson v. Guestier*, 4 Cranch. Rep., p. 293; *Williams, et al., v. Armoyd*, 7 Cranch. Rep., p. 523; *The Arabella and Madeira*, 2 Gallis. Rep., p. 368; *The*

*Henric and Maria*, 6 Rob. Rep., p. 138, note; *The Falcon*, 6 Rob. Rep., p. 198; *La Dame Cecile*, 6 Rob. Rep., p. 257; *Hautefeuille*, *Des Nations Neutres*, tit. 12, ch. 2; *Azuni*, *Droit Maritime*, tome 2, ch. 4, art. 3, § 8; *Gakani*, *De Doveri*, pt. 1, c. 9, § 8; *Massé*, *Droit Commercial*, liv. 2, tit. 1, ch. 2; *Pistoye et Duverdy*, *Des Prises*, tit. 8; *Dalloz*, *Repertoire*, verb. *Prises Maritimes*; *Phillimore*, *On Int. Law*, vol. 3, §§ 361, 375.)

§ 15. The sentence of a competent prize court of the captor's country, is conclusive upon the question of property in the captured thing; it forecloses all controversy respecting the validity of the capture, as between the claimants and the captors of those claiming under them, and terminates all ordinary judicial inquiry upon the subject matter. The captors cannot be held responsible in the court of any other country, nor can the question of the ownership of the captured property be made a matter of judicial investigation when once decided by a competent prize court. A contrary rule, allowing the prize courts of one country to review and reverse the decisions of the prize courts of another country, would lead to great irregularities and endless disputes and litigation. The competency of the court and its jurisdiction may, however, as will be shown hereafter, be made the subject of judicial inquiry. (*Dalloz*, *Repertoire*, verb. *Prises Maritimes*, sec. 7; *Wheaton*, *Elem. Int. Law*, pt. 4, ch. 2, § 16; *Rutherford*, *Institutes*, b. 2, ch. 9, § 19; *Phillimore*, *Int. Law*, vol. 3, §§ 368, 369; *The Cosmopolite*, 3 Rob. Rep., p. 334; *Bello*, *Derecho Internacional*, pt. 2, cap. 5, § 4.)

§ 16. "Where the responsibility of the captor ceases," says Mr. Wheaton, "that of the state begins. It is responsible to other states for the acts of the captors under its commission, the moment these acts are confirmed by the definitive sentence of the tribunals which it has appointed to determine the validity of captures in war." The sentence of the judge is conclusive against the subjects of the state, but it cannot have the same controlling efficiency toward the subjects of a foreign state. It prevents any further judicial inquiry into the subject matter, but it does not prevent the foreign state from demanding indemnity for the property of its subjects which may have been unlawfully condemned by the prize court of another nation. "The institution of these tribunals,

so far from exempting, or being intended to exempt, the sovereign of the belligerent nations from responsibility for the acts of his commissioned cruisers, is designed to ascertain and fix that responsibility. Those cruisers are responsible only to the sovereigns whose commissions they bear. So long as seizures are regularly made upon apparent grounds of just suspicion, and followed by prompt adjudication in the usual mode, and until the acts of the captors are confirmed by the sovereign in the sentences of the tribunals appointed by him to adjudicate in matters of prize, the neutral has no ground of complaint, and what he suffers is the inevitable result of the belligerent right of capture. But the moment of the decision of the tribunal of the last resort has been pronounced, (supposing it not to be warranted by the facts of the case, and by the law of nations applied to those facts,) and justice has been thus finally denied, the capture and the condemnation become the acts of the state, for which the sovereign is responsible to the government of the claimant." Not only may a state demand indemnity for the property of its citizens unlawfully condemned by a foreign prize court, but, if refused, it may resort to reprisals or even to war. The right of redress in this case rests upon the same grounds as the right of redress for injuries received, and a denial of justice persisted in. This principle is supported by the authority of publicists, and by historical examples. If justice is not done to the other claimants by the prize courts of the captors, says Rutherford, "they may apply to their own state for a remedy; which may, consistently with the law of nations, give them a remedy, either by solemn war or reprisals. In order to determine when their right to apply to their own state begins, we must inquire when the exclusive right of the other state to judge in this controversy ends. As this exclusive right is nothing else but the right of the state, to which the captor belongs, to examine into the conduct of its members before it becomes answerable for what they have done, such exclusive right cannot end until their conduct has been thoroughly examined. Natural equity will not allow that the state should be answerable for their acts, until those acts are examined by all the ways which the state has appointed for this purpose. Since,



therefore, it is usual in maritime countries to establish not only inferior courts of marine, but likewise superior courts of review, to which the parties may appeal, if they think themselves aggrieved by the inferior courts; the subjects of a neutral state can have no right to apply to their own state for a remedy against an erroneous sentence of an inferior court, till they have appealed to the superior court, or to the several superior courts, if there are more courts of this sort than one, and till the sentence has been confirmed in all of them. For these courts are so many means appointed by the state, to which the captors belong, to examine into their conduct; and, till their conduct has been examined by all these means, the state's exclusive right of judging continues. After the sentence of the inferior courts has been thus confirmed, the foreign claimants may apply to their own state for a remedy, if they think themselves aggrieved; but, the law of nations will not entitle them to a remedy, unless they have been actually aggrieved. When the matter has been carried thus far, the two states become the parties to the controversy." (*Manning, Law of Nations*, p. 383; *Wheaton, Elem. Int. Law*, pt. 4, ch. 2, § 16; *Rutherford, Institutes*, b. 2, ch. 9, § 19; *Grotius, De Jur. Bel. ac Pac.*, lib. 3, cap. 2, § 5; *Bynkershoek, Quaest. Jur. Pub.*, lib. 1, cap. 24; *Vattel, Droit des Gens*, liv. 2, ch. 18, § 350; *Bello, Derecho Internacional*, pt. 2, cap. 5, § 4; *Dalloz, Repertoire, verb. Prises Maritimes*, sec. 6.)

§ 17. In 1753 the King of Prussia undertook to set up within his own dominions a commission to re-examine the sentences pronounced against his subjects in the British prize courts; this was deemed an innovation upon the settled usage of nations. But, although the British government asserted the proceedings of their prize tribunals to be the only legitimate mode of determining the validity of captures made in war, it did not consider these proceedings as excluding the demand of Prussia for redress upon the government itself. The king even resorted to reprisals, by stopping the interest upon a loan due to British subjects, and secured by hypothecation upon the revenues of Silecia, until he actually obtained from the British government an indemnity for the Prussian vessels unjustly captured and condemned. So, also

under the treaty of 1794, between the United States and Great Britain, a mixed commission was appointed to determine the claim of American citizens, arising from the capture of their property by British cruisers during the existing war with France, and a full and satisfactory indemnity was awarded, in many cases where there had been a final condemnation by courts of prize. Again, in the negotiation between the Danish and American governments respecting the captures of American vessels by the cruisers of Denmark during the war between that power and England, it was admitted that, although the jurisdiction of the tribunals of the capturing nation was exclusive and complete, and had the effect of closing forever all private controversy between the captors and the captured, still, the American government might demand indemnity for unlawful condemnations. "The demand which the United States made upon the Danish government was not for a judicial reversal of the sentences pronounced by its tribunals, but for the indemnity to which the American citizens were entitled, in consequence of the denial of justice by the tribunal in the last resort, and of the responsibility thus incurred by the Danish government for the acts of its cruisers and tribunal. The Danish government was, of course, free to adopt any measures it might think proper to satisfy itself of the injustice of those sentences, one of the most natural of which would be a reëxamination and discussion of the cases complained of, conducted by an impartial tribunal, under the sanction of the two governments, not for the purpose of disturbing the question of title to the specific property which had been irrevocably condemned, or of reviving the controversy between the individual captors and claimants, which had been forever terminated, but for the purpose of determining between government and government whether injustice had been done by the tribunals of one power against the citizens of the other, and of determining what indemnity ought to be granted to the latter." There are many other instances where arrangements of this kind have been made between states, for determining and settling claims which arise from the unjust condemnation of prize tribunals. (*Wheaton, Elem. Int. Law*, pt. 4, ch. 2, § 16; *Rutherford, Institutes*, b. 2, ch. 9,

§ 19; *Grotius, de Jur. Bel. ac Pac.*, lib. 1, cap. 24; *Vattel, Droit des Gens.*, liv. 2, ch. 7, § 84; ch. 18, § 350; *Wheaton, Hist. Law of Nations*, pp. 206—217; *Martens, Nouveau Recueil*, tome 8, p. 350; *Cong. Doc.*, H. R. Ex. Doc. 1881-2, No. 249, pp. 24-30; *Manning, Law of Nations*, p. 333.)

§ 18. We have already stated the general principle that the sentence of a prize court, of competent jurisdiction, *in rem*, is conclusive upon the title to the property condemned. It may be added, that the general presumption is, that the jurisdiction exercised by a foreign tribunal, is lawful. But that presumption may be overturned by competent evidence. Where a claim is set up under a sentence of condemnation of a foreign court, every court has a right to examine into the jurisdiction of such foreign court, so far, at least, as to ascertain its competency, in international law, to pronounce the adjudication. Whenever the jurisdiction cannot, consistently with the law of nations, be exercised, the sentence will be disregarded. If, therefore, a vessel be condemned under circumstances which show that the court could, under the rules of international law, have no jurisdiction, such sentence will be regarded as a nullity. For instance, a condemnation of a prize, by the consul of the belligerent, in a neutral country, is deemed invalid, because such a jurisdiction cannot be exercised consistently with the law of nations. Moreover, the jurisdiction may be inquired into, not only with respect to the subject matter, but also with respect to the authority from which it has emanated; and if the jurisdiction be unauthorized from either cause, it is a decisive objection to the sentence. (*Phillips, On Insurance*, vol. 2, pp. 680. et seq.; *Abbot, On Shipping*, 6th Am. ed., p. 31, note; *Armroyd v. Williams*, 2 Wash. Rep., p. 608; 7 Cranch. Rep., p. 423; *Glass, et al. v. The Betsey*, 3 Dallas Rep., p. 6; *Wheelwright v. Depeyster*, 1 Johns. Rep., p. 471; *Cherrot v. Fousat*, 3 Binn. Rep., p. 220; *Snell v. Foussat*, 1 Wash. Rep., p. 271; *Bradstreet v. Nep. Ins. Co.*, 3 Sumner Rep., p. 600; *Francis v. Ocean Ins. Co.*, 6 Cowen Rep., p. 404; *Cuculler v. Lou. Ins. Co.*, 5 Martin N. S., p. 464; *Ocean Ins. Co. v. Francis*, 2 Wend. Rep., p. 65; *Heffler, Droit International*, § 172.)

§ 19. We have already pointed out the distinction between prize courts and municipal tribunals, with respect to their

constitution and character. The same distinction exists with respect to the laws which they administer. Prize courts are in no way bound to regard local ordinances and municipal regulations, unless they are sanctioned by the law of nations. Indeed, if such ordinances and regulations are in contravention of the established rules of international jurisprudence, prize courts must either violate their duty, or entirely disregard them. They are not binding on the prize courts, even of the country by which they are issued. The stipulations of treaties, however, are obligatory upon the nations which have entered into them, and prize courts must observe them in adjudicating between subjects or citizens of the contracting parties. The language of Sir William Scott, in delivering the judgment of the court in the case of *The Maria*, is peculiarly just and appropriate. "In forming my judgment, I trust it has not escaped my anxious recollection for one moment, what it is that the duty of my station calls from me; namely, to consider myself as stationed here, not to deliver occasional and shifting opinions, to serve present purposes of particular national interest, but to administer, with indifference, that justice which the law of nations holds out, without distinction, to independent states, some happening to be neutral, and some to be belligerent. The seat of judicial authority is, indeed, locally *here*, in the belligerent country, according to the known law and practice of nations; but the law itself has *no locality*. It is the duty of the person who sits here, to determine this question exactly as he would determine the same question, if sitting at Stockholm; to assert no pretensions on the part of Great Britain, which he would not allow to Sweden in the same circumstances; and to impose no duties on Sweden, as a neutral country, which he would not admit to belong to Great Britain, in the same character. If, therefore, I mistake the law in this matter, I mistake that which I consider, and which I mean should be considered, as universal law upon the question." In speaking of the right of a prize court to adjudicate upon maritime captures, Rutherford remarks: "The right which it exercises, is not civil jurisdiction; and the civil law, which is peculiar to its own territory, is not the law by which it ought to proceed. Neither the place where the controversy

arose, nor the parties who are concerned in it, are subject to this law. The only law by which this controversy can be determined, is the law of nature, applied to the collective bodies of civil societies, that is, *the law of nations*; unless, indeed, there have been any particular treaties made between the two states, to which the captors and the other claimants belong, mutually binding them to depart from such rights as the law of nations would otherwise have supported. Where such treaties have been made, they are a law to the two states, as far as they extend, and to all the members of them in their intercourse with one another. The state, therefore, to which the captors belong, in determining what might or what might not be lawfully taken, is to judge by these particular treaties, and by the law of nations taken together." (*Mably, Droit des Gens*, tome 2, pp. 350, 351; *Phillimore, On Int. Law*, vol. 3, §§ 434, et seq.; *Wheaton, Hist. Law of Nations*, p. 171; *Duer, On Insurance*, vol. 1, p. 445; *Wheaton, Elem. Int. Law*, pt. 4, ch. 2, § 15; *Rutherford, Institutes*, b. 2, ch. 6, § 19; *The Maria*, 1 Rob. Rep., p. 340; *The Snipe*, Edw. Rep., p. 381; *The Recovery*, 6 Rob. Rep., p. 348; *Heffter, Droit International*, § 173.)

§ 20. "No proceedings," says Mr. Justice Story, "can be more unlike than those in the courts of common law and in admiralty. In prize courts, in an especial manner, the allegations, the proofs, and the proceedings, are, in general, modeled upon the civil law, with such additions and alterations as the practice of nations and the rights of belligerents and neutrals unavoidably impose." The parties in a prize case are, therefore, not limited in their recovery, *secundum allegata et probata*, as in the case of a declaration at common law; but the court having jurisdiction over the property, exerts its authority over all the incidents, and will shape its decree as the circumstances of the case may require. After the first hearing of the cause, orders are made for further proof, not only in the court below, but also in the appellate court. Not only the proceedings, but also the rules of evidence, are, in many respects, different from those of courts of common law; and prize courts not only decide upon the claims of the captors, but also upon their conduct in making the capture, and subsequently, and not unfrequently declare

a forfeiture of their rights, with vindictive damages. We subjoin a digest of some of the decisions of the supreme court of the United States on proceedings in prize cases, and the duties and liabilities of captors. In prize causes, the evidence to acquit or condemn, must come, in the first instance, from the papers and crew of the captured ship. It is the duty of the captors to bring the ships' papers into the registry of the district court, verify them on oath, and to have the examinations of the principal officers and seamen of the captured ship taken on the standing interrogatories, and not *viva voce*. It is exclusively upon these papers and examinations that the cause is to be heard in the first instance. If, from this evidence, the property clearly appears to be hostile or neutral, condemnation or restitution immediately follows. If the property appears to be doubtful, or the case suspicious, further proof may be granted according to the rules which govern the legal discretion of the court, if the claimant has not forfeited his right to it by a breach of good faith. The supreme court hears the cause, in the first instance, upon the evidence transmitted from the circuit court, and decides upon that, whether it is proper to allow further proof. If the court below has denied an order for further proof, when it ought to have been granted, or has allowed it, when it ought to have been denied, and the objection was made by the party, and appears on the record, the appellate court can administer the proper relief. Where the national character does not distinctly appear, or where the question of proprietary interest is left in doubt, further proof is usually ordered. If the parties have had the benefit of plenary proof in the court below, an order for further proof is not allowed by the appellate court, except under very special circumstances. If there is reason to believe that the applicant has suppressed important documentary evidence, or that the parties have been guilty of gross fraud, or misconduct, or illegality, further proof is not allowed. Further proof by the claimant, inconsistent with that already in the case, is refused. Where an order for further proof is made, and a party neglects to comply with it, courts of prize are in the habit of considering such negligence as fatal to his claim. The concealment or spoliation of papers by an enemy-master

carrying a cargo chiefly hostile, does not thereby preclude a neutral claimant, to whom no fraud is imputable, from further proof. The circumstance of goods being found on board an enemy's ship, raises, in general, a legal presumption that they are enemy's property, and the *onus probandi* of a neutral interest rests on the claimant. Affidavits, to be used as a further proof, must be taken under a commission. Depositions taken on further proof, in one prize cause, cannot be invoked into another. Where the affidavits produced as further proof are positive, but their credibility impaired by the non-production of letters mentioned therein, a second order for further proof will be allowed in the appellate court. (*The Dos Hermanos*, 2 Wheaton Rep., p. 76; *The Pizarro*, 2 Wheaton Rep., p. 227; *The Amiabile Isabella*, 6 Wheaton Rep., p. 1; *The London Packet*, 2 Wheaton Rep., p. 371; *Schooner Adeline and cargo*, 9 Cranch. Rep., p. 244; *The Venus*, 5 Wheaton Rep., p. 127; *The Atalanta*, 5 Wheaton Rep., p. 433; *The Fortuna*, 3 Wheaton Rep., p. 236; *The Euphrates*, 8 Cranch. Rep., p. 385; *The Experiment*, 4 Wheaton Rep., p. 84.)

§ 21. A vessel libelled as prize, is in the custody of law, and under the control of the court. The prize court in which proceedings were instituted, has power to order a sale, even after an appeal; and although such sale, after an appeal, is irregular, this irregularity will not render the captors liable to pay the amount of the sales, which did not come into their hands, but were under the control of the court. A sale made before condemnation, by one acting under the possession of the captor, does not divert the prize court of its jurisdiction to decide the question of prize, and the subsequent condemnation, relates back to the capture, affirms its legality, and establishes the title of the purchaser. In the United States a warrant immediately goes to the marshal to take possession of the property, and he is bound to keep it in *salva et arcta custodia*; and if any loss happen by his negligence, he is responsible for it to the court. In England, it formerly actually remained in the custody of the court, and does so now in contemplation of law, although the admiralty, merely for convenience, allow the captors to retain the possession in England, but as the agents of the court, and not in the right of property. And the court still

retains its custody, notwithstanding an unlivery and deposit in public warehouses. (*Phillimore, On Int. Law*, vol. 8, §§ 442–444; *Smart v. Wolff*, 3 Durn. and East. Rep., pp. 328, 329; *The Herkimer*, Stewart Rep., p. 128; *The Maria*, 4 Rob. Rep., p. 348; *The Rendsberg*, 6 Rob. Rep., pp. 142, 174; *The Concord*, 9 Cranch. Rep., p. 387; *The Nereide*, 1 Wheat. Rep., p. 171; *The Hoop*, 4 Rob. Rep., p. 145; *Bello, Derecho Internacional*, pt. 2, cap. 5, § 5.)

§ 22. As has already been remarked, it is the duty of the captors to send their prize into a convenient part of their own country, and to immediately bring the case before the proper court for adjudication. If they fail to do this, the claimant may apply to the court for a monition to the captors to proceed forthwith for adjudication, and if they neglect to do so after service and return of such monition, the court will, if a proper case be laid before it, proceed to award not only restitution, but also damages and costs. Even if the captors agree to a restitution, if they have unreasonably delayed to make it, demurrage will be allowed against them. The libel filed by the captors is usually in very general terms, setting forth the facts of the capture, and alleging the captured property to be a subject of prize rights; but the captors are not required at the commencement of the suit to allege the particular grounds upon which they base their claim to a condemnation. But the court may, in its discretion, afterwards order special pleadings. In case of joint captures, the libel is filed by the actual seizors, and those claiming the benefit of joint capture afterwards file their claim, giving bonds to the required amount for costs. On the filing of the libel, the usual practice is to issue a monition, citing all persons who are interested to appear by a given day, and show cause why the specified property should not be condemned as prize, etc. (*Bello, Derecho Internacional*, pt. 2, cap. 5, § 5; *Wildman, Int. Law*, vol. 2, p. 378; *Phillimore, On Int. Law*, vol. 8, § 470, et seq.; *The Betsey*, 1 Rob. Rep., p. 93; *The Mentor*, 1 Rob. Rep., p. 181; *The Huldah*, 3 Rob. Rep., p. 239; *The Der Mohr*, 3 Rob. Rep., p. 129; *The George*, 3 Rob. Rep., p. 212; *The William*, 4 Rob. Rep., p. 215; *The Susanna*, 6 Rob. Rep., p. 48; *The Adeline*, 9 Cranch. Rep., p. 244; *The Fortuna*, 1 Dod. Rep., p. 81; *The Conqueror*, 2 Rob. Rep., p. 303; *Prize Act*, 17 Vic. C. 18, § 47.)



§ 23. As a general rule, the subject of the enemy cannot appear as a claimant, for he has no *persona standi* in the court. But if the captured vessel was sailing under a cartel, or flag of truce, and was captured by mistake or under circumstances of suspicion, it is considered to form an exception to this rule, and the enemy master is allowed to appear and claim restitution. A party to be entitled to assert a claim in a prize court, must be the general owner of the property; a person who has a mere lien on the property for a debt, whether liquidated or unliquidated, is not entitled to assert his claim; nor can the mortgagee assert any claim, where the mortgagor has been left in possession. An appearance by a proctor for the claimants, duly entered, cures all defects of process, such as the want of monition or of due notice. And, even assuming, that one partner has no authority to appoint a proctor for all the parties, yet a general appearance for all by a proctor is good and legally binding. A claim must be made by the parties interested, if present, or, in their absence, by the master of the ship, or some agent of the owners. A mere stranger will not be permitted to interpose a claim merely to speculate on the chances of an acquittal. (*Phillimore, On Int. Law*, vol. 3, §§ 461-466; *The Falcon*, 6 Rob. Rep., p. 199; *The Daifjie*, 3 Rob. Rep., p. 143; *The Mary*, 5 Rob. Rep., p. 199; *The Eenrom*, 2 Rob. Rep., p. 1; *The Tobago*, 5 Rob. Rep., p. 218; *The Frances*, 8 Cranch. Rep., pp. 355, 418; *The Marianna*, 6 Rob. Rep., p. 24; *Balch v. Darrel*, Bees Rep., p. 74; *Penhallow v. Doane*, 2 Dallas Rep., p. 54; *Hills v. Ross*, 3 Dallas Rep., p. 231.)

§ 24. A claimant who wishes to procure the restitution of any property captured as prize, must, after the libel is filed, and at or before the return of the monition thereon, or within the time assigned by the court, enter his claim for such property, accompanied with an affidavit, stating briefly the facts respecting the claim and its verity. If the parties themselves are not within the jurisdiction of the court, or at a very great distance, the claim may be sworn to by an agent. Before the claim, duly sworn to, is put in, the claimants are not, as a general rule, permitted to examine the ship's papers, as this might lead to great abuses, but sometimes, on special application, the court will permit so many of the papers to be

examined as it may deem proper, in order to enable the claimant to set forth the particular grounds of his claim. The pleadings both on the part of the captors and claimants, are of a very simple character, formed upon the rules and practice of the Roman law. Both the libel and claim are of a general character, *special allegations* of particular circumstances not being usually made. With respect to the reception of evidence, courts allow every relaxation of technical rules which are permitted to prevail in the country in which it is taken. As a general rule no claim is admitted which stands in entire opposition to the ship's papers and to the preparatory examinations. Nor can any person be permitted to claim in a prize where the transaction in which he is engaged is in violation of the municipal law of his own country, or of that where the court is sitting. Claimants must give bonds for costs and expenses to the amount required by statute or the rules of the court. (*Phillimore, On Int. Law*, vol. 1, §§ 466-470; *The Port Mary*, 3 Rob. Rep., p. 238; *The Vrouw Anna Catharina*, 5 Rob. Rep., pp. 15-19; *La Flora*, 6 Rob. Rep., p. 1; *The Walshingham Packet*, 2 Rob. Rep., p. 77; *The Etrusco*, 4 Rob. Rep., p. 262; *The Cornelis and Maria*, 5 Rob. Rep., p. 23; *The Abby*, 5 Rob. Rep., p. 251; *The Recovery*, 6 Rob. Rep., p. 341; *The Peacock*, 4 Rob. Rep., p. 185; *The Arabella and Madeira*, 2 Gallis. Rep., p. 368.)

§ 25. When a sentence is pronounced either of acquittal or condemnation, it is generally, in the English prize court, by an *interlocutory decree*, but in the United States it is the more common practice, to reserve a decree until a final decision of all the questions before the court. Decrees of *acquittal*, may be either with or without damages and costs, or on condition of paying costs and expenses. If the specific property remains in the custody of the court and *restitution* is decreed, it is directed to be delivered to the claimant; but if disposed of, the proceeds are so delivered. In case of *condemnation* in favor of a privateer, it is usual in England, to deliver a decree, with a proper commission to the master of the privateer to make sale of the prize and return an account to the court; but in the United States all sales before and after condemnation, are made by the marshal, who returns

the funds to the court to be distributed by its order. (*Philimore, On Int. Law*, vol. 3, §§ 498-497; *Marriott's Forms*, pp. 194, 196; *Benedict, Admiralty*, §§ 558, 559; *The Lively*, 1 Gal. Rep., p. 315; *The Rendsberg*, 6 Rob. Rep., p. 142; *The Fortuna*, 4 Rob. Rep., p. 278; *The Venus*, 4 Rob. Rep., p. 235; *U. S. Statutes at Large*, vol. 2, pp. 792, 798.)

## CHAPTER XXXII.

### RIGHTS OF MILITARY OCCUPATION.

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§ 1. The term *conquest*, as it is ordinarily used, is applicable to conquered territory the moment it is taken from the enemy; but, in its more limited and technical meaning, it includes only the real property to which the conqueror has acquired a *complete title*. Until the ownership of such property so taken

is confirmed or made complete, it is held by the right of *military occupation*, (*occupatio bellica*,) which, by the usage of nations and the laws of war, differs from, and falls far short of, the right of *complete conquest*, (*debellatio ultima victoria*.) These will form the subjects of the next two chapters. The right of one belligerent to occupy and govern the territory of the enemy while in its military possession, is one of the incidents of war, and flows directly from the right to conquer. We, therefore, do not look to the constitution, or political institutions of the conqueror, for authority to establish a government for the territory of the enemy in his possession, during its military occupation, nor for the rules by which the powers of such government are regulated and limited. Such authority, and such rules, are derived directly from the laws of war, as established by the usage of the world, and confirmed by the writings of publicists, and the decisions of courts—in fine, from the law of nations. But, when the conquest is made complete, in whatsoever mode, the right to govern the acquired territory follows as the inevitable consequence of the right of acquisition, and the character, form, and powers of the government established over such conquered territory, are determined by the constitution and laws of the state which acquires it, or with which it is incorporated. The government established over an enemy's territory during its military occupation, may exercise all the powers given by the laws of war to the conqueror over the conquered, and is subject to all the restrictions which that code imposes. It is of little consequence whether such government be called a *military* or a *civil* government; its character is the same, and the source of its authority the same: in either case, it is a government imposed by the laws of war, and so far as it concerns the inhabitants of such territory, or the rest of the world, those laws alone determine the legality, or illegality of its acts. But the conquering state may, of its own will, whether expressed in its constitution, or in its laws, impose restrictions additional to those established by the usage of nations, conferring upon the inhabitants of the territory so occupied privileges and rights to which they are not strictly entitled by the laws of war; and, if such government of military occupation violate these additional restrictions so

imposed, it is accountable to the power which established it, but not to the rest of the world. (*Coccejus, De Jure Victoriæ*, passim; *Heffler, Droit International*, §§ 131, 186; *Flemming et al. v. Page*, 9 Howard Rep., p. 603; *Cross et al. v. Harrison*, 16 Howard Rep., p. 164; *Marcy to Kearny*, June 11th, 1847, Ex. Doc. No. 17, 31st Cong. 1st sess. H. R.; *Kamptz, Literatur des Volk.*, § 307; *Isambert, Ann. Pol. et Dips., Int.*, p. 115; *Cushing, Opinions U. S. Att'ys Gen'l.*, vol. 8, p. 365; *Gardner, Institutes*, p. 208; *Puffendorf, de Jure Nat. et Gent.*, lib. 8, cap. 6, §§ 17, 27; *Vattel, Droit des Gens*, liv. 3, ch. 13, § 197.)

§ 2. We will here consider the question, when do the rights of military occupation begin, or how are we to fix the date of a conquest? Bouvier defines a conquest to be, "the acquisition of the sovereignty of a country by *force of arms*, exercised by an independent power, which reduces the vanquished to the submission of its empire." It follows, then, that the rights of military occupation extend over the enemy's territory only so far as the inhabitants are vanquished or reduced to submission to the rule of the conqueror. Thus, if a fort, town, city, harbor, island, province, or particular section of country belonging to one belligerent, is forced to submit to the arms of the other, such place or territory instantly becomes a conquest, and is subject to the laws which the conqueror may impose on it; although he has not yet acquired the *plenum dominium et utile*, he has the temporary right of possession and government. As this temporary title derives its validity entirely from the force of arms on the one side, and submission to such force on the other, it necessarily follows that it extends no further, and continues no longer, than such subjugation and submission extend and continue. Thus, if one belligerent take possession of a port, or town, or province of the other, he cannot, therefore, pretend to extend his government and laws over places or provinces which he has not yet reduced to submission, or, by reason of a particular possession, to claim a general control and authority. By occupying a port of an enemy's coast, we have a right, so long as we retain its possession, to exclude neutral vessels from such port, or admit them on such terms as to us may seem fit and proper; but we cannot exclude neutral vessels, or impose our

regulations upon neutral commerce in ports of the enemy which are not in our possession. To extend the rights of military occupation, or the limits of conquest, by mere intention, implication or proclamation, would be establishing a *paper conquest*, infinitely more objectionable in its character and effects than a *paper blockade*. "The rule is," says Wildman, "that the whole is possessed by the occupation of a part, if an intention to appropriate the whole accompany such occupation, and all others be excluded from occupying the residue. Otherwise, possession of real property would be impossible, as it does not admit of manual apprehension or corporal incumbency in all its parts. Two persons cannot have several possessions of the same thing at the same time; such possession of one excludes the possession of another. Hence, if one be in possession, and another enter upon part which is not in the actual possession of the first, by such entry he gains possession of no more than he actually occupies. The constructive occupation of the owner is defeated by actual occupation, so far as it extends. Thus it is said by Celsus, if an enemy enter a territory by force of arms, it is in possession of so much only as it occupies. When he speaks of force, he supposes resistance on behalf of the sovereign, in defence of his possession. *An army only possesses a country so far as it compels the enemy's forces to retire.* The meaning of Paulus is probably the same, when he says that possession of part, with an appropriating mind, is possession of the whole up to its boundary. By boundary, he signifies the commencement of another's possession. Upon these principles, the extent of hostile possession may be distinctly defined. If an army be in possession of a principal town of a province, it is not thereby in possession of the towns and forts within the same, which hold out for the enemy. Forceful possession extends so far only as there is an absence of resistance. The occupation of part by right of conquest, with intent to appropriate the whole, gives possession of the whole, *if the enemy maintain military possession of no portion of the residue.* Under such circumstances, military possession of a capital would be possession of a whole kingdom. *But if any part hold out, so much only is possessed as is actually conquered.* Thus, both the States-General and the king of Spain maintained, during the

controversies that arose out of the truce between Spain and the United Provinces, that the possession of the surrounding country follows the possession of a town. The military possessors of a town must necessarily have the surrounding country in their power, unless there be a fortress within it; in which case, the country commanded by the fortress would not be in their possession. These principles show the absurdity of the pretensions of the western and eastern empires that have been founded on the possession of Rome and Constantinople." The same principles are recognized in the decision of Calvin's case. "Now come we," says Lord Coke, "to France and the members thereof, as Calais, Guynes, Tournay, etc., which descended to King Edward III., as son and heir to Isabel, daughter and heir to Philip le Beau, king of France. Certain it is, whilst King Henry VI. had both England and the heart and greatest part of France under his actual legiance and obedience, (for he was crowned king of France in Paris,) that they that were then born *in those parts of France that were under actual legiance and obedience*, were no aliens, but capable of, and heritable to, lands in England." Those born in parts of France not under actual legiance and obedience, and prior to King Henry's recognition and coronation, were regarded as *antenatis*, and received letters patent of denization, as in the case of Reynel. (*Bouvier, Law Dic., verb. Conquest; Bynkershoek, Quaest. Jur. Pub.*, lib. 1, cap. 6; *Duponceau, Translation of Bynkershoek*, p. 116, note; *Grotius, de Jur. Bel. ac Pac.*, lib. 2, ch. 22, § 13; *Wildman, Int. Law*, vol. 1, pp. 163, 164; *Calvin's Case*, Coke Rep., pt. 7, p. 220; *Fleming, et al., v. Page*, 9 Howard Rep., p. 603; *Justinian, Pandects*, xli., 2; xviii., 4; *Heffter, Droit International*, § 186; *Schwartz, de Jure Vic., in Res Incorp.*, th. 27.)

§ 3. It must not be inferred from what has just been said, that the conqueror can have no control or government of hostile territory unless he actually occupies it with an armed force. It is deemed sufficient that it submits to him and recognizes his authority as a conqueror; for conquests are in this way extended over the territory of an enemy without actual occupation with armed force. But so much of such territory as refuses to submit, or to recognize the authority of the conqueror, and is not forcibly occupied by him, cannot



be regarded as under his control or within the limits of his conquest; and he therefore cannot pretend to govern it or to claim the temporary allegiance of its inhabitants, or in any way to direct or restrict its intercourse with neutrals. It remains as the territory of its former sovereign,—hostile to him, as a belligerent, and friendly to others, as neutrals. The government of the conqueror being *de facto* and not *de jure*, it must always rest upon the fact of *possession*, which is adverse to the former sovereign, and therefore can never be inferred or presumed. In other words, the rights of the conqueror are those of possession and not of title, and whenever brought in question they must be proved, and cannot be presumed. Not only must the possession be actually acquired, but it must be *maintained*. The moment it is lost, the rights of military occupation over it are also lost. In the words of Chief Justice Taney, “By the laws and usages of nations, conquest is a valid title *while the victor maintains the exclusive possession* of the conquered country.” (*Heffter, Droit International*, § 131; *Flemming, et al. v. Page*, 9 Howard Rep., p. 613; *Duponceau, Translation of Bynkershoek*, p. 116, note; *Wildman, Int. Law*, vol. 1, pp. 163, et seq.; *Schwartz, De Jure Vic. in Res Incorp.*, th. 27.)

§ 4. Political laws, as a general rule, are suspended during the military occupation of a conquered territory. The political connection between the people of such territory and the state to which they belong is not entirely severed, but is interrupted or suspended so long as the occupation continues. Their lands and immovable property are, therefore, not subject to the taxes, rents, etc., usually paid to the former sovereign. These, as we have said elsewhere, belong of right to the conqueror, and he may demand and receive their payment to himself. They are a part of the spoils of war, and the people of the captured province or town can no more pay them to the former government than they can contribute funds or military munitions to assist that government to prosecute the war. To do so would be a breach of the implied conditions under which the people of a conquered territory are allowed to enjoy their private property, and to pursue their ordinary occupations, and would render the offender liable to punishment. They are subject to the laws of the

conqueror, and not to the orders of the displaced government. Of lands and immovable property belonging to the conquered state, the conqueror has, by the rights of war, acquired the use so long as he holds them. The fruits, rents and profits are, therefore, his, and he may lawfully claim and receive them. Any contracts or agreements, however, which he may make with individuals farming out such property, will continue only so long as he retains control of them, and will cease on their restoration to, or recovery by, their former owner. (*Heffter, Droit International*, § 131–133, 186; *Vattel, Droit des Gens*, liv. 3, ch. 18, § 197, et seq.; *Am. Ins. Co. v. Canter*, 1 Peters Rep., p. 542; *Flemming, et al. v. Page*, 9 Howard Rep., p. 603; *Burlamaqui, Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 7; *Schwartz, De Jure Vic. in Res Incorp.*, th. 27; *Wildman, Int. Law*, vol. 1, pp. 163, et seq.)

§ 5. The municipal laws of a conquered territory, or the laws which regulate private rights, continue in force during military occupation, except so far as they are suspended or changed by the acts of the conqueror. Important changes of this kind are seldom made, as the conqueror has no interest in interfering with the municipal laws of the country which he holds by the temporary rights of military occupation. He nevertheless has all the powers of a *de facto* government, and can, at his pleasure, either change the existing laws, or make new ones. Such changes, however, are, in general, only of a temporary character, and end with the government which made them. On the confirmation of the conquest by a treaty of peace, the inhabitants of such territory are, as a general rule, remitted to the municipal laws and usages which prevailed among them prior to the conquest. Neither the civil nor the criminal jurisdiction of the conquering state is considered, in international law, as extending over the conquered territory during military occupation. Although the national jurisdiction of the conquered power is replaced by that of military occupation, it by no means follows that this new jurisdiction is the same as that of the conquering state. On the contrary, it is usually very different in its character, and always distinct in its origin. Hence, the ordinary jurisdiction of the conquering state does not extend to actions, whether civil or criminal, originating

in the occupied territory. "Military occupation and military government," says Ortolan, "is not sufficient to change the national jurisdiction, and to substitute the jurisdiction of the occupying state for that of the territory temporarily occupied. Such an effect is produced only by incorporation or definitive occupation. We refer here only to the jurisdiction of common law, and the ordinary and usual cognisance of cases, without in any manner diminishing the rights derived from war and the measures necessary for the government of military occupation." The author then refers to a decision of the court of cassation on appeal from the court of assizes of the Pyrénées Orientales, in the case of Villasseque, a Frenchman, charged with the crime of assassination committed in the territory of Catalonia, Spain, during the military occupation by France, in the summer of 1811. It was contended by the prosecution that, inasmuch as Catalonia was occupied by French troops, and the government administered by French authorities, it must be considered as French territory; but the court in its decision (Arrêt du 22 Janvier, 1818,) said: "This occupation and this administration by French troops and French authorities, had not communicated to the inhabitants of Catalonia the title of Frenchmen, nor to their territory the quality of French territory; this communication could result only from an act of union emanating from the public authority, which never existed." The same view has been taken by the Attorney General of the United States, with respect to crimes committed in Mexico during the military occupation of that country by the United States. (*Heffler, Droit International*, § 131; *Ortolan, Diplomatic de la Mer*, liv. 2, ch. 13; *Campbell v. Hall*, 1 Cowper Rep., p. 204; *Cross, et al. v. Harrison*, 16 Howard Rep., p. 193; *Toucy, Opinions U. S. Att'ys Gen'l*, vol. 5, p. 55; *Kamptz, Literatur des Volkerrecht*, § 307; *Cocceius, De Jure Vic. in Res Incorp*, passim.)

§ 6. How then are crimes to be punished which are committed in territory occupied by force of arms, but which are not of a military character nor provided for in the military code of the conquering state? To solve this question it will be sufficient to recur to the principles already laid down. Although the laws and jurisdiction of the conquering state

do not extend over such foreign territory, yet the laws of war confer upon it ample power to govern such territory, and to punish all offenses and crimes therein by whomsoever committed. The trial and punishment of the guilty parties may be left to the ordinary courts and authorities of the country, or, they may be referred to special tribunals organized for that purpose by the government of military occupation; and where they are so referred to special tribunals, the ordinary jurisdiction is to be considered as suspended *quoad hoc*. It must be remembered that the authority of such tribunals has its source, not in the laws of the conquering, nor in those of the conquered state, but, like any other powers of the government of military occupation, in the laws of war; and, in all cases not provided for by the laws actually in force in the conquered territory, such tribunals must be governed and guided by the principles of universal public jurisprudence. How far the laws of the former government continue in force after the conquest, and how far they are replaced by those of the conquering state, by those enacted by the government *de facto*, or by new principles of jurisprudence, or usages and customs introduced with the conquerors, is considered in other places, and need not be repeated here. In the war between the United States and the republic of Mexico, it was found that no provisions had been made in the United States rules and articles of war for numerous cases, civil and criminal, between citizens of the United States and between such citizens and foreigners, in Mexican territory occupied by our troops, and consequently without the jurisdiction of any court of the United States. All such cases, of a criminal character, arising in the territory of Mexico occupied by the "main army" under General Scott, were referred by him to "military commissions," which were special tribunals constituted and appointed for that purpose; in California, they were usually left to be decided by the ordinary tribunals of the country, although special tribunals were there organized, in a few special cases, by the government of military occupation. This was in conformity to principle,—martial law of the conqueror, or, as it has been called, "extra-territorial martial law," was the governing rule, while the civil or special tribunal was the instrument

of, or acted in subordination to, the military power, and the limitations to this power were the laws of war. (*Heffler, Droit International*, § 131; *Ortolan, Diplomatie de la Mer*, liv. 2, ch. 13; *Kamptz, Literatur des Volk*, §§ 307, 308; *Gardner, Inst. of Am. Int. Law*, p. 208; *Cushing, Opinions of U. S. A. G.*, pp. 365, et seq.; *Howard, Parl. Deb., N. S.*, vol. 115, p. 880; *Scott, Gen'l Orders*, No. 20, Feb. 19th, 1847; *Marcy, to Scott*, Feb. 15, 1847; *Cong. Doc.*, No. 60, 30th Cong., 1st sess. H. of R., p. 874.)

§ 7. It is said by English writers, that when a country has been conquered by British arms, it immediately becomes a dominion of the king in right of his crown, and that the inhabitants of such conquered territory, once received under the king's protection, become his subjects and are universally to be regarded in that light, and not as enemies or aliens. As no other act than that of conquest is requisite to make the conquered territory a dominion of the crown, and nothing more than submission to the king's authority and protection, on the part of the inhabitants of such territory, is necessary to make them subjects of the king, such territory is no longer to be regarded, either by other nations or by other parts of the British empire, as a foreign country, or its inhabitants as aliens. In other words, foreign territory becomes a dominion, and its inhabitants the subjects of the king, *ipso facto*, by the conquest made by the British arms, without any action of the legislature,—the parliament of Great Britain. (*Calvin's Case*, Coke Rep., part 7; *Elphinstone v. Bedreechund*, Knapp. Rep., p. 338; *Campbell v. Hall*, 23 State Trials, p. 322; *Campbell v. Hall*, 1 Cowper Rep., p. 205; *Fabrigas v. Moslyn*, 1 Cowper Rep., p. 165; *Callet v. Lord Keith*, 2 East Rep., p. 260; *Blankard v. Guldly*, 4 Mod. Rep., p. 225.)

§ 8. But a different rule holds in the United States. The peculiar character of our government, and the powers vested in it by the federal constitution, have given rise to rules somewhat peculiar and anomalous, with respect to the government of conquered territory. The President, in the exercise of his constitutional power as commander-in-chief of the army, and the military officers under his authority, may, when war has been declared, seize the enemy's possessions, and estab-

lish a government and laws for the territory so seized and occupied. Such territory is subject to the sovereignty and dominion of the United States as soon as the enemy is driven out or submits to our arms. But neither the President nor his officers can extend the limits, or enlarge the boundaries of the union. This can only be done by congress. As the institutions and laws of the United States do not extend beyond the limits before assigned to them by the legislative power, the inhabitants of a conquered territory, during its military occupation by the United States, can claim none of the rights and privileges established by such laws. And even where these institutions and laws are adopted by the government of military occupation, the rights which they confer upon the inhabitants of the conquered territory, do not extend to the states or territories of the United States. The conquered territory is under the sovereignty and authority of the union; but it is not a part of the United States; nor does it cease to be a foreign country, or its inhabitants cease to be aliens, in the sense in which these words are used in our laws. They are to be governed by martial law, as regulated and limited by public law. But while such territory forms no part of the union, and its inhabitants have none of the rights, immunities, and privileges of citizens of the United States, under the federal constitution and laws; nevertheless, other nations are bound to regard the conquered territory, while in our possession, as territory of the United States, and to respect it as such, and to regard its inhabitants as under our protection and government; "for, by the laws and usages of nations," says Chief Justice Taney, "conquest is a valid title, while the victor maintains the exclusive possession of the conquered country. The citizens of no other nation, therefore, have a right to enter it without the permission of the American authorities, nor to hold intercourse with its inhabitants, nor to trade with them. As regards all other nations, it is a part of the United States, and belongs to them as exclusively as the territory included in our established boundaries." (*Gardner, Institutes*, p. 208; *Flemming, et al. v. Page*, 9 Howard Rep., p. 615; *Cross, et al. v. Harrison*, 16 Howard Rep., p. 164.)

§ 9. This distinction between conquered territory in the military occupation of the United States, and territory of the United States within the limits of the federal union, as established by congress, is a very important one, and leads to very important consequences. It has been recognized and established by the decisions of the highest judicial authority, and must be regarded as the law of the land. The relations between the inhabitants of such conquered territory and foreign nations, are, therefore, very different from the relations between the people of the United States and such nations, as previously established by treaties and commercial law. The intercourse of foreign nations with such territory, is regulated by the government of occupation, under the direction of the President of the United States, as commander-in-chief of the army, or, in other words, by martial law. Hence, the scale of duties on goods imported into the conquered territory, and the tonnage on vessels entering its ports, may be different from those on vessels and goods brought into the United States. The victor may either prohibit all commercial intercourse with his conquest, or place upon it such restrictions and conditions as may be deemed suitable to his purpose. To allow intercourse at all, is a relaxation of the rights of war. So, also, the rules of intercourse and trade, between the inhabitants of the United States and such conquered territory, may be very different from the rules regulating the intercourse and trade between different parts of the union. An American vessel entering a port of the conquered territory, during its military occupation by the United States, must conform to the regulations adopted, and pay the duties exacted, by the government of such territory; and an American vessel, returning to the United States from a port of such territory, is regarded as coming from a foreign port, and not as engaged in the coasting trade; and the cargo is not exempt from the payment of duties as fixed by the laws of the United States for goods imported from a foreign country. The right of the victor to the revenues of the conquered territory, is firmly established and recognized by the laws of war, and the usage of nations. It is immaterial whether these revenues arise from imports taxes, rents of public property, duties on imports and exports, or from any other source,

they are a part of the conquest, and rightfully belong to the conqueror. Those who are permitted to hold commercial intercourse with such territory, whether they be subjects of the conqueror, or of foreign states, must conform to the regulations, and pay the duties established by the conquering power; and, in case of conquest by the United States, the President, in the absence of legislative enactments, exercises this power. (*Burlamaqui, Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 7; *Heffter, Droit International*, §§ 131–133; *Flemming, et al. v. Page*, 9 Howard Rep., p. 603; *Cross, et al. v. Harrison*, 16 Howard Rep., p. 164; *Gardner, Institutes*, p. 208; *Cushing, Opinions U. S. Att'ys Gen'l*, vol. 8, §§ 365, et seq.)

§ 10. The effect of military occupation, by one belligerent, of a portion of the territory of the other, so far as respects revenue laws, has been adjudicated upon by the supreme court of the United States; 1st, with respect to neutral territory in possession of the enemy; 2d, with respect to territory of the United States in possession of the enemy; and 3d, with respect to the enemy's territory in the possession of the United States. 1. In the case of the island of Santa Cruz, belonging to the Kingdom of Denmark, but in the military occupation of British forces, the supreme court says: "Although acquisitions made during war are not considered as permanent until confirmed by treaty, yet, to every commercial and belligerent purpose, they are considered as a part of the domain of the conqueror, so long as he retains the possession and government of them. The island of Santa Cruz, after its capitulation, remained a British island until it was restored to Denmark." 2. *Castine*, in the United States, was captured by the British forces on the first day of September, 1814, and remained in their exclusive possession until after the ratification of the treaty of peace, in February, 1815. "By the conquest and military occupation of *Castine*," says the supreme court, "the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over that place. The sovereignty of the United States over the territory was, of course, suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conquerors.



By the surrender, the inhabitants passed under a temporary allegiance to the British government, and were bound by such laws, and such only, as it choose to recognize and impose. From the nature of the case, no other laws could be obligatory upon them; for where there is no protection or allegiance, or sovereignty, there can be no claim to obedience. Castine was, therefore, during this period, so far as respected our revenue laws, to be deemed a foreign port, and goods imported into it by the inhabitants were subject to such duties only as the British government choose to require. Such goods were, in no correct sense, imported into the United States." 3. In the case of *Tampico*, in Mexico, which was captured and occupied by the arms of the United States, during the war with Mexico, the supreme court held that cargoes of goods landed there were liable to the duties charged on them by the military authorities of the United States, whether shipped from the United States or from foreign countries. (*Thirty Hogsheads of Sugar v. Boyle*, 9 Cranch. Rep., p. 191; *United States v. Rice*, 4 Wheaton Rep., p. 246; *Flemming, et al. v. Page*, 9 Howard Rep., p. 603; *Cross, et al. v. Harrison*, 16 Howard Rep., p. 164.)

§ 11. In the absence of any laws of Congress on this subject, the regulating and collecting of such revenues, in enemy's territory in our possession, devolves upon the President of the United States, as the constitutional commander-in-chief, and upon the military and naval officers under his direction. The moneys derived from these sources may be used for the support of the government of the conquered territory, or for the expenses of the war. They are war revenues and do not belong to the treasury of the United States until so directed by a law of Congress. Being no part of the moneys of the treasury of the United States their expenditure is not regulated by the general laws of the United States, but by the direction of the president of the United States, under whose authority they were collected.

During the war of 1846, between the United States and Mexico, and on the conquest of the ports of the latter republic on the Gulf of Mexico, the president of the United States formed a tariff of duties on goods from the United States,

and foreign countries, admitted into such ports in our military possession. A different one, however, had been previously adopted for California, by the military and naval commanders on the Pacific coast and gulf of California, which, with certain modifications was, with the tacit approval of the president, continued to the end of the war. Certain missions and other public property in California were rented by the military commander and governor, and certain movable property belonging to the former government was sold by the same authority. The moneys derived from these sources constituted the "military contribution fund," which was used for the expenses of the government of occupation, and for carrying on the war. By subsequent acts of Congress the moneys so collected, and not expended were made to form a portion of the funds in the treasury of the United States, and the expenditures were settled and audited by the proper officers of the treasury department. (*Flemming, et al. v. Page*, 9 Howard Rep., p. 603; *Cross, et al. v. Harrison*, 16 Howard Rep., p. 164; *Dunlap, Digest of Laws of U. S.*, p. 1342.)

§ 12. As military occupation produces no effect, (except in special cases, and in the application of the severe right of war, by imposing military contributions and confiscations) upon private property, it follows as a necessary consequence, that the ownership of such property may be changed during such occupation, by one belligerent of the territory of the other, precisely the same as though war did not exist. The right to alienate is incident to the right of ownership, and unless the ownership be restricted or qualified by the victor, the right of alienation continues the same during his military possession of the territory in which it is situate, as it was prior to his taking the possession. A municipality or corporation, has the same right as a natural person to dispose of its property during a war, and all such transfers are, *prima facie*, as valid as if made in time of peace. If forbidden by the conqueror, the prohibition is an exception to the general rule of public law, and must be clearly established. (*Kent, Com. on Am. Law*, vol. 1, p. 92; *Wheaton, Elem. Int. Law*, pt. 4, ch. 2, §§ 5, 6; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 12; *Heffler, Droit International*, §§ 131, 186; *Cobraz v.*

*Raisin*, 3 Cal. Rep., p. 445; *Welch v. Sullivan*, 8 Cal. Rep., p. 165; *Isambert*, *Am. Pol. et Dip. Int.*, p. 115; *Kamptz*, *Literatur*, etc., § 307; *Hart v. Burnett*, 15 Cal. Rep., p. 559; *Payne & Devey v. Treadwell*, 16 Cal. Rep., p. 220.)

§ 13. It has been stated elsewhere, that the *lex loci rei sitae* governs in everything relating to the tenure, title and transfer of real property; also, that the municipal laws of a conquered territory continue in force during military occupation, except so far as they are suspended or changed by the acts of the conqueror. It is not necessary, however, that such change should be made by special decree, it may be done by the introduction of a different system of jurisprudence, or a different usage and custom. As a general rule, there can be no custom in relation to a matter regulated by positive law, as custom derives its force from the tacit consent of the legislative power and the people. But, the sovereign will may be implied or presumed, as well as expressed by words. A series of facts, as a public, uniform, general and continued usage, constitutes a *custom*, which has the force of law, because the sovereign will is therein implied. *Time* is the important element of customary or common law, in an established and continuous government. But, where a new government, with different institutions, a different system of laws and different customs, is suddenly established by the operations of war and the rights of conquest, the same effect upon the common law of the country may be immediately produced, which, under other circumstances, would require "time, whereof the memory of man runneth not to the contrary." During the military occupation of California by the forces of the United States, the use of Mexican stamped paper was necessarily dispensed with, for conveyances, and other official writings and private contracts. And, as the local officers of the then existing government of California, were generally ignorant of the Spanish language and Spanish forms of conveyancing, real estate was usually transferred by the simple deeds of conveyance commonly used in the United States. As such conveyances were seldom executed in conformity with the requisitions of Mexican municipal law, their validity rested upon the usage introduced with the government of military occupation. Titles to many millions of property in that

country were transferred in this way, and the usage continued after the restoration of peace, and, until the enactment of other laws by the local government, after its organization as a state. Conveyances so made and executed, have always been regarded as valid and sufficient for the transfer of real property. In the first place, the law requiring the use of stamped paper was a law for revenue, and, consequently, was suspended, with other political laws, *ipso facto*, by the conquest, and completely abrogated by the cession. In the second place, by the *lex loci sitae*, with respect to the forms and execution of conveyances of real property was also suspended in its operation, by the introduction of a different usage with the government of the conquerors, and, from the nature of the case, the inhabitants of California could hardly be considered as remitted to this law by the restoration of peace. But this point will be more particularly discussed in the next chapter. (*Vide Post*, ch. xxxiii; *Heffler*, *Droit International*, § 185; *Boyer*, *Universal Pub. Law*, ch. 16; *Bowyer*, *Law Dic.*, verb. *Custom*; *Febrero Mexicano*, tit. prelim., cap. 4.)

§ 14. It may be stated, as a general proposition, that the duty of allegiance is reciprocal to the duty of protection. When, therefore, a state is unable to protect a portion of its territory from the superior force of an enemy, it loses, for the time, its claim to the allegiance of those whom it fails to protect, and the inhabitants of the conquered territory pass under a temporary or qualified allegiance to the conqueror. The sovereignty of the state which is thus unable to protect its territory is displaced, and that of the conqueror is substituted in its stead. But this change of sovereignty may be only of a temporary character, for the conquered territory may be recaptured by the former owner, or it may be restored to him by a treaty of peace. During mere military occupation the sovereignty of the conqueror is unstable and incomplete. Hence the allegiance of the inhabitants of the territory so occupied is a temporary and qualified allegiance, which becomes complete only on the confirmation of the conquest, and with the express or implied consent of the conquered. (*Burlamaqui*, *Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 6; *Flemming*, et al. v. *Page*, 9 Howard Rep., p. 603; *American Ins. Co. v. Cauter*, 1 Peters Rep., p. 542; *Calvin's*

case, Coke Rep., part 7; *Rayneral, Inst. du Droit Nat*, etc., liv. 3, ch. 20; *Heffter, Droit International*, §§ 132, 186; *Puffendorff, De Jur. Nat. et Gent.*, lib. 8, ch. 6, § 21.)

§ 15. But when does this change of temporary allegiance actually take place? And under what circumstances may the inhabitants of a conquered city or province take up arms to repel the conqueror, and assist their former sovereign in recovering his lost possessions? These are delicate questions, not always easy of decision. And yet, their resolution involve matters of the utmost importance; for the decision of the first fixes the line between justifiable homicide and murder, and that of the second will determine whether those taken in arms are to be treated as prisoners of war, or may be executed as military insurgents. As a general rule, the inhabitants of a place lose their right to resist on its complete capture or formal surrender, and the conqueror then loses his right to kill. Those who retain their arms and refuse to surrender, are still enemies, exercising the rights of war, and subject to its consequences; but those who submit are bound by the conditions, express or implied, of such submission. Obedience to the laws which the conqueror may impose by the right of conquest, is undoubtedly one of these implied conditions. But is there no limit to such obedience, and may not those who have thus submitted to the authority of the victorious enemy, throw off, at any time, this temporary allegiance to the conqueror, and restore the former and rightful sovereignty? In other words, does not their duty to their own country involve the right of insurrection against that of the conqueror? In order to arrive at a satisfactory answer to this question, it may be well to consider the more general right of *revolution*. For, although there is a broad and obvious distinction between an insurrection of a conquered city or province against the conqueror, and a revolution against an established government, yet it will be found, on examination that both rest upon the same general principle—the relation of protection and allegiance, or the reciprocity of right and obligation. (*Vattel, Droit des Gens*, liv. 3, ch. 8, §§ 136–140; *Burlamaqui, Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 6; *Wheaton, Elem. Int. Law*, pt. 4, ch. 2, §§ 1, 2; *Leiber, Political Ethics*, b. 3, ch. 1, § 1; *Puffendorff, De Jur*

*Nat. et Gent.*, lib. 8, ch. 6, § 21; *Heffter*, *Droit International*, § 124.)

§ 16. In ancient times, when a city or district of country was conquered, the principal male inhabitants, capable of resistance, were put to the sword. This was an exercise of the extreme right of war, and justified on the ground of necessity, as the hostility and continued resistance of the inhabitants of the conquered place, would otherwise prevent the conqueror from pursuing his military operations, for the purpose of securing the object of the war. But, in more civilized ages, when a place is taken by one of the belligerents, and the people lay down their arms, they are allowed to continue their ordinary peaceful occupations, without hindrance or restraint, but with the tacit or implied agreement, that they will oppose no further resistance to the power of the conqueror. They are virtually in the condition of prisoners of war on parole. No word of honor has been given, but it was implied; for only on that condition would the conqueror have relinquished the extreme right of war which he held over their lives, and have suffered them freely and peacefully to pursue their ordinary avocations. But this implied obligation does not bind those who remain in arms, or those who are retained as prisoners of war; *their* right of resistance continues. It is only those who enjoy the favors of the conqueror, by a relaxation of the rights of war for their benefit, that are tacitly bound by the acceptance of such favors. If they decline the favor, they do not assume the obligation. Thus, a prisoner of war who refuses to give his *parole*, may kill his guard and effect his escape, without any violation of the laws of war, or the obligations of honor and morality. (*Vattel*, *Droit des Gens*, liv. 3, ch. 8, §§ 136–138; *Burlamaqui*, *Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 6; *Grotius*, *de Jur. Bel. ac Pac.*, lib. 3, cap. 8; *Heffter*, *Droit International*, §§ 119, 124.)

§ 17. It must also be observed, that this tacit agreement is mutual and equally binding upon both parties. If the conquered are under the implied obligation to make no further resistance to the conqueror, it is only in consideration of the favors and privileges they are to derive from a relaxation of

the extreme rights of war, by being allowed peacefully to pursue their ordinary occupations, without any further restraint than may be necessary for the safety of the conqueror. But if the conqueror should impose unusual and unnecessary restraints, should treat them with unmerited harshness, should destroy or confiscate their property, taking away the liberty of some and the lives of others,—such conduct on his part, would release them from the obligation of non-resistance, and restore to them the rights of belligerents in actual war. Insurrections, in such cases, are justified by the law of necessity and the natural right of protecting life, liberty, and property. (*Leiber, Pol. Ethics*, b. 3, ch. 1, § 1; b. 4, ch. 2, § 29; *Vattel, Droit des Gens*, liv. 3, ch. 9, §§ 139, 140; *Burlamaqui, Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 6; *Heffter, Droit International*, § 124; *Abegg, Untersuchungen*, p. 86; *Heffter, Lehrbuch des Criminalrechtes*, § 37.)

§ 18. The abstract question of the right of a people to take up arms against the authorities of an established government, has often been discussed by speculative writers. However opposed it may be to the general theory of political organization and government, it can hardly be doubted that a revolution, in certain circumstances, would be justifiable. But in what circumstances? Here opinions diverge, and doubts and difficulties increase as we advance, till all hope of a satisfactory conclusion is lost. Abandoning, then, all chance of deciding what constitutes justifiable causes of civil revolutions, we must judge of them by their effects. If we turn to history, we find that they form some of its brightest and some of its darkest pages. Sometimes nations have been benefited by them, and sometimes they have proved the utter ruin of whole states. While, therefore, the right of revolution is opposed by the juriconsult on technical grounds, and admitted by the philosopher on the ground of necessity, all agree that such a terrible rupture of the frame-work of civil society should be resorted to only where all other means of redress have failed. "Governments, long established, should not be changed for light and transient causes. \* \* \*

But when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under an absolute despotism, it is their right, it is their duty,

to throw off such government, and to provide new guards for their future security." (*Vattel, Droit des Gens*, liv. 3, ch. 18, §§ 390, 291; *Taylor, On Revolutions*, passim; *Burlamaqui, Droit de la Nat. et des Gens*, tome 5, pt. 2, ch. 6; *Declaration of American Independence*; *Encyclopædia Americana*, verb. *Insurrection*; *Leiber, Political Ethics*, b. 4, ch. 8, §§ 28, 29.)

§ 19. The right of insurrection in war, therefore, rests upon the same principle as the right of revolution against an established government. The general duty of obedience to the laws, results from the protection they afford to the lives and property of the citizens and subjects; but when a civil government fails to afford that protection, and obstinately persists in a course injurious to the people, and when the probable evils accompanying the change are not greater than the blessings to be obtained by it, revolution becomes a duty as well as a right. So, also, with respect to the military government of occupation established by the conqueror; its course may be so injurious to the conquered people as to render submission intolerable, and to justify them in resorting to the necessary, but cruel alternative, of insurrection. The principle is plain and clear, but there is great difficulty in its application to particular cases. The historians of the conquered power almost invariably justify such insurrections on the score of patriotism, while those of the opposite party as uniformly condemn them as in violation of the laws of war, and the implied obligation of submission. As, in revolutions, success or failure usually gives to a military insurrection the popular character of patriotic resistance, or of a cruel and unjustifiable sacrifice of human life. They are too often judged of by the results produced, rather than by the causes which originated them, and the motives for which they were undertaken. Of all the operations of a war they are the most doubtful in their character and unsatisfactory in their results, being usually attended by the most atrocious cruelties, and not unfrequently terminating, even when successful, in the most horrible crimes. As might naturally be expected, where the fiercer passions are unbridled, the innocent and guilty suffer alike, without respect to age, sex, or condition. Hence, the good produced by a military insurrection seldom compensates for the evils which attend it or



follow its train. (*Heffter, Droit International*, § 124; *Abegg, Untersuchungen*, etc., p. 86; *Leiber, Political Ethics*, b. 4, ch. 3, § 28; *Alison, Hist. Europe*, vol. 1, pp. 405, 468; *Vattel, Droit des Gens*, liv. 3, ch. 18, §§ 290, 291.)

§ 20. As the conquered inhabitants, in a military insurrection, throw off all implied obligations of submission to the authority of the conqueror, and resort to the extreme rights of war, it follows that the conqueror may, in such a case, resume towards the insurgent enemy the severe and extreme rights of the same code over life and property. The insurgents taken in arms, as well as their instigators, may therefore be put to death, and their property confiscated or destroyed. But this extreme right of the conqueror over military insurgents, is limited by the laws of humanity, and he is not justifiable if he resort to cruel and unnecessary punishments. Such severe rights should always be used with moderation, and their exercise tempered with mercy. Hence, in modern wars, only the leaders and instigators of a military insurrection are usually punished with death, while the common people who are engaged in it are more leniently dealt with. Sometimes, heavy contributions are levied by way of punishment upon the place or district of country where the insurrection occurs. This practice is justified on the ground that the instigators and leaders, being usually the originators of the insurrection, should suffer the punishment due to the offence, and that a community is to be held responsible for the acts of its members where the individual offenders cannot be otherwise reached. It must be remembered, however, that although by the rules of war the conqueror has a lawful right to impose the severest punishment upon military insurgents, it by no means follows that he is justifiable in so doing. We must here distinguish between what is permitted by the law and what is forbidden by morality. As there is no legal tribunal to determine upon the justice of a war, neither is there one to determine upon the cause of a military insurrection, or the justice of the punishment imposed upon the insurgents. But there is a tribunal of public opinion to which all are subject. If, therefore, the conqueror has, by acts of tyranny and oppression, given good cause for a revolt in a place occupied by force of arms, his own conduct will

be condemned, and that of the insurgents approved at the bar of conscience and in the opinion of all good men. (*Vide Ante*, chapter xviii, and xix; *Vattel*, *Droit des Gens*, liv. 3, ch. 18, §§ 290, 291; *Heffter*, *Droit International*, §§ 126, 127; *Puffendorf*, *De Jur. Nat. et Gent.*, lib. 8, ch. 6, §§ 21, 22; *Barbeyrac*, *Note sur Puffendorf*, tome 2, p. 474.)

§ 21. History abounds in examples of this kind of insurrection, and of punishments inflicted by the conqueror upon the insurgents. Without recurring to the wars of the middle ages, of the reformation, of Charles V., Louis XIV., and Frederick II., before the principles of international law were fully established or generally recognized, we find numerous examples in the wars of Napoleon, in Europe, and of the English, in India. And, without noticing the military operations of Clive, Hastings, Sir Eyre Coote, and Wellington, we have, in the recent war in the latter country, some most terrible examples of the severity with which military insurrections are punished at the present day, and by the most civilized conquerors. But, a few illustrations drawn from the wars of Napoleon, will suffice for our purpose. In the Italian campaign of 1796, the inhabitants of Pavia rose against the French troops, and made them prisoners. Lannes routed a portion of the insurgents, and burnt the village of Brescia; but, as this severe example failed in producing intimidation, Napoleon himself returned to the revolted city, shot the leaders of the insurrection, and delivered up the place to plunder. "This terrible example," says the English historian, "crushed the insurrection over the whole of Lombardy." In the campaign of 1797, a Venetian insurrection was organized on the Adige, four hundred wounded French in the hospital of Verona were killed in cold blood, and the French garrison of fort Chiusa, which capitulated for want of provisions, was inhumanly put to death. The insurrection was immediately suppressed, its authors shot, and a contribution of one million one hundred thousand francs levied on the city. In the peninsular war many of the Spaniards and Portuguese, after submitting to the French, took advantage of every opportunity to rise upon a small garrison or detachment, and to murder all stragglers. They were punished with severity. "So many

complaints," says Napier, "were made of the cruelty committed by Massena's army while at Santarem, that Lord Wellington had some thoughts of reprisals; but having first caused strict inquiry to be made, it was discovered that in most cases, the ordenanças after having submitted to the French, and received their protection, took advantage of it to destroy the stragglers and small detachments, and the cruelty complained of was only the infliction of *legitimate punishment* for such conduct; the projected retaliation was therefore changed for an injunction to the ordenanças to cease from such a warfare." (*Jamini, Des Guerres de la Revolution*, ch. 73; *Thiers, Revolution Francaise*, tome 8, ch. 4; tome 9, ch. 2; *Alison, Hist. Europe*, vol. 1, pp. 405, 468; *Napier, Hist. Peninsular War*, vol. 2, p. 451; *Napoleon, Memoires*, tome 3, p. 195; tome 4, p. 149.)

§ 22. Military occupation, as has already been stated, suspends the sovereignty and dominion of the former owner so long as the conquered territory remains in the possession of the conqueror, or in that of his allies. The temporary dominion of the latter completely excludes, for the time being, the original dominion of the former. The vanquished sovereign, therefore, has no power, as against the conqueror, to alienate any part of his own territory which may be at the time in the possession of the latter. If the conquest be completed, or confirmed, the title passes to the conqueror precisely as it was when the latter first acquired the possession. No other party can claim any rights over it arising from any conveyance or transfer from the vanquished, while it was in the conqueror's possession. But, if it be surrendered up to the former owner, or recovered by him, such conveyances would become valid, for the alienor would not be permitted to deny his own act. It is a principle of jurisprudence that *possession of*, and the *right to*, the thing alienated—the *jus ad rem* and the *jus in re*—are necessary in the grantor in order to constitute a complete title. During military occupation these exist together neither in the original owner, nor in the conqueror. The title conveyed by either is therefore imperfect; if by the former, it is made good by a restoration of the conquest; and, if by the latter, it is completed by a confirmation of the conquest, whether by

treaty or any other mode recognized in international law. (*Wildman, Int. Law*, vol. 1, p. 160; *Kent, Com. on Am. Law*, vol. 1, p. 180; *The Flotina*, 1 Dod. Rep., p. 450; *The Fama*, 5 Rob. Rep., p. 97; *Grotius, de Jur. Bel. ac Pac.*, lib. 2, ch. 6, § 1; *Puffendorf, de Jur. Nat. et Gent.*, lib. 4, ch. 9, § 8; *Heffter, Droit International*, § 181.)

§ 23. But suppose war to be declared and actually commenced, and that one of the belligerents has made manifest his intention to effect the permanent acquisition of a particular portion of the territory of the other, which intention is afterwards accomplished by actual conquest, and that after the declaration of such intention and while preparation was making to carry it out, the original owner should alienate that territory, in whole or in part,—is the conqueror bound to regard such alienation as a valid transfer, or may he disregard it *in toto*, as being an illegal attempt to deprive him of the rights of war? In other words, did not his avowed determination to effect the permanent acquisition of such territory, his preparation to make the conquest, and his ability to effect it, as proved by the result, give to the conqueror some inchoate or inceptive right to the territory subsequently conquered; or did they not at least suspend the right of the original owner to alienate it? In order to obtain a satisfactory solution of this question, we will recur to fundamental principles. The rights of conquest are derived from *force* alone. They begin with possession, and end with the loss of possession. The possession is acquired by force, either from its actual exercise, or from the intimidation it produces. There can be no antecedent claim or title, from which any *right* of possession is derived; for if so, it would not be a *conquest*. The assertion and enforcement of a *right* to possess a particular territory do not constitute a *conquest* of that territory. By the term conquest, we understand the *forcible* acquisition of territory admitted to belong to the enemy. It expresses, not a *right*, but a *fact*, from which rights are derived. Until the fact of conquest occurs, there can be no rights of conquest. A title acquired by conquest cannot, therefore, relate back to a period anterior to the conquest. That would involve a contradiction of terms. The title of the original owner prior to the conquest, is, by the very

nature of the case, admitted to be valid. His rights are, therefore, suspended by force alone. If that force be overcome, and the original owner resumes his possession, his rights revive, and are deemed to have been uninterrupted. It, therefore, cannot be said, that the original owner loses any of his rights of sovereignty, or that the conqueror acquires any rights whatever, in the conquered territory, anterior to actual conquest. The former are suspended by, and the latter derived from, the *fact* of conquest, and, in order to determine the date of such suspension or acquisition of rights, we must refer to the fact of conquest, and not to any prior intention or determination of the conqueror. If these propositions be true, it follows that grants to individuals made, after the commencement of hostilities, by the original sovereign of lands lying in territory, of which he still retains the dominion and ownership, rests upon the same foundation as those made before the war. If the title thus conveyed is, by municipal law, complete and perfect, the land becomes private property, and must be so regarded by the conqueror. If it be inchoate and imperfect, but *bona fide* and equitable, it nevertheless constitutes "property" in the sense in which that term is used in international law. It is true that, by the extreme rights of war, the conqueror may disregard individual ownership, and take private property and convert it to his own use. But such a proceeding, as has already been said, is contrary to modern practice, and cannot be resorted to, except in particular cases and under peculiar circumstances. As neither actual hostilities, nor a formal declaration of war, can suspend or terminate the sovereignty of the original owner, he retains and may exercise his dominion over every portion of his territory, till actual conquest. (*Bowyer, Law Dictionary verb. Conquest; Flemming, et al., v. Page, 9 Howard Rep., p. 616; Phillimore, On Int. Law, vol. 3, § 223; Vattel, Droit des Gens, liv. 2, ch. 13, § 197; Heffler, Droit International, § 131.*)

§ 24. But, suppose that the vanquished power, while the conqueror is actually taking forcible possession of a part of its territory, should send its agent with the retreating army, and, as the hostile force advances its standard from district to district, should deliver to individual subjects title deeds of

the territory at the moment it was about to fall into the possession of the advancing foe, with the evident intention to deprive him of the fruits of his conquest. Must the conqueror recognize such grants as valid; and if not, how shall he draw the line of distinction between them and other titles issued by the same authority after the commencement of hostilities and before actual conquest? The want of good faith on the part of such grantees, as well as on the part of the grantor, would deprive them of the rights of *bona fide* purchasers. The distinction between such titles and those acquired in good faith and granted in good faith, and in the ordinary exercise of the rights of original sovereignty, is abundantly manifest. The *fraudulent intent* vitiates the entire transaction, and renders the titles mere nullities, and the conqueror, both during military occupation and after complete conquest by the cessation of hostilities, may refuse to recognize them, unless by some express treaty stipulation he has agreed to regard them as valid. But it must be observed that the same rule applies to grants made prior to the war; if not *bona fide*, the conqueror is not bound to recognize them as valid. The fact of the conqueror being in possession of a part of the country, or even of its capital, produces no effect upon the part which remains in the possession of the former sovereign. This question has been discussed in another section. (*Mass v. Riddle & Co.*, 5 Cranch. Rep., p. 357; *Wildman*, *Int. Law*, vol. 1, pp. 163, 164; *Grotius*, *de Jur. Bel. ac Pac.*, lib. 2, cap. 22, § 13; *Bynkershoek*, *Quaest. Jur. Pub.*, lib. 1, cap. 6.)

§ 25. Again, suppose a belligerent should, after a declaration of war, and in anticipation that a particular portion of its territory will necessarily fall into the power of the other party, transfer it to a neutral for the manifest purpose of depriving his enemy of an opportunity to acquire it by conquest: is the latter bound to recognize the validity of such transfer? Every sovereign and independent state has an undoubted right to alienate any part of its own territory, so long as it retains the ownership and dominion; and other sovereign states have an equal right to acquire such ownership and dominion by any of the modes recognized in international law. But a mere treaty-cession of a province or

territory by one power to another, can never operate, by itself, as an immediate and complete transfer of the ownership and dominion of the land, or of the allegiance of its inhabitants. To produce such effect, a solemn delivery of the possession by the ceding power, and an assumption of the dominion and government by that to which the cession is made, are indispensable. Until then, the territory continues to belong to the original sovereign owner, and its inhabitants remain the subjects of the power to which their allegiance was due prior to such treaty-cession. Such ceded territory is, therefore, still liable to conquest as the territory of the enemy. But suppose the transfer be completed by a formal delivery of the possession to the neutral grantee, and the assumption by him of the dominion and government of the ceded territory? If the transaction is evidently *male fide* and the transfer is made with the manifest intent to defraud the belligerent of the rights of conquest, the pretended ownership of the neutral sovereign will not be recognized by the conqueror. Moreover, such an attempt on the part of a neutral to hold territory for the benefit of one of the parties to a war, and in fraud of the belligerent rights of the other party, is regarded as a violation of neutral duty, and as an act of hostility toward the party whose rights he thus attempts to defeat. Such transfers of territory by a belligerent to a neutral are mere nullities, for fraud vitiates the transactions of states as well as of individuals. But the general right of neutrals to purchase the property of belligerents, *flagrant bello*, if the sale be *bona fide*, is universally conceded. The character of each transaction must be decided upon its own merits, and the determination of the question belongs to the political power of the state. Although the transfer may have been made with the evident intent to defraud the belligerent of the rights to which he is entitled by the laws of war, nevertheless, policy may induce him to treat it as a *bona fide* transaction, rather than to involve himself in hostilities with the pretended purchaser. (*Heffler, Droit International*, § 181; *Duer, On Insurance*, vol. 1, pp. 437, 438; *The Fama*, 5 Rob. Rep., p. 97; *The Johanna Emelia*, 29 Eng. Law and Equity Rep., p. 562; *Cushing, Opinions of Att'ys Gen'*, vol. 6, p. 688.)

§ 26. We have next to consider the effect of military occupation upon incorporeal things and rights, as debts, etc. Of these it has been justly remarked: "They cannot in themselves be the subject of actual possession; they are not external things on which the conqueror can lay his armed hand. They are rights which exist in mental apprehension as connected with a given subject to which they are attached, and with a material object upon which they can be exercised. Therefore, the Roman law philosophically said, *ipsum jus obligationes incorporale est*, and again, *vec possideri videtur jus incorporale*." It is, therefore, only by the actual possession of corporeal thing to which the incorporeal right attaches that the conqueror can be considered as occupying the latter; but, if he possess himself of the former, he is considered to be in possession of both. A distinction, however, is made between incorporeal rights attached to a *corporeal thing* and those attached to a *person*. Man, it is said, as the subject of rights, cannot be compared to a thing; his rights do not, so to speak, hang upon him as they hang upon a piece of land; they rather proceed from him; they constitute his intellectual or spiritual property, which cannot, by the agency of what Grotius calls a *nudum factum*, be separated, without his consent, from his person. It follows, therefore, that when a person to whom certain rights belong is captured by an enemy, such capture gives to the captor only the corporeal and actual things in the possession of the prisoner; the possession of the creditor's person does not give a *jus exigendi* of his debts. It therefore follows, that incorporeal things, such as debts, do not accrue to the conqueror as a consequence of his possession of the person who is entitled to them. The rule was somewhat different when prisoners of war were made slaves. But may not debts accrue to the conqueror from his possession of the instruments or documents which contain the legal statement of the obligation of the obligor, as promissory notes, mortgages, etc.? We have shown in a preceding chapter that such documents are only *evidences* of debts, but not the debts themselves, and that the mere fact of their possession does not of itself authorize the possessor to exact payment from the promisor. The original creditor may be entitled to recover his debt



though these instruments be lost or destroyed. (*Digests*, i. t. viii., 1; xli. t. iii., 4, s. 27; xli., t. ii., 3; *Brunkeyer, Diss. de Occupatione Bellica, Argent*, 1702; *Pfeiffer, Das Recht der Kreigseroberung, etc.*, pp. 44–60; *Phillimore, on Int. Law*, vol. 3, §§ 545–548; *Burlamaqui, Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 3, § 14; *Puffendorf, De Jure Nat. et Gent.*, lib. 8, cap. 6, § 22; *Heffler, Droit International*, § 134; *Real, Science du Government*, tome 5, ch. 2, sec. 5.)

§ 27. We will next consider the effect of a military occupation of a state upon debtso wing to its government. Does such conquest of the state carry with it the incorporeal rights of the state, such as debts, etc.? In other words, do these rights so attach themselves to the territory that the military possession of the latter carries with it the right to possess the former? There are two distinct cases here to be considered; *first*, where the *imperium* of the conqueror is established over the *whole* state, (*victoria universalis*;) and *second*, where it is established over only a *part*, as the capital, a province, or a colony (*victoria particularis*.) As has already been stated, all rights of military occupation arise from *actual* possession, and not from constructive conquests; they are *de facto*, and not *de jure* rights. Hence, by a conquest of part of a country, the government of that country, or the *state*, is not in the possession of the conqueror, and he, therefore, cannot claim the incorporeal rights which attach to the whole country as a *state*. But, by the military possessions of a part, he will acquire the same claim to the incorporeal rights which attach to that part, as he would, by the military occupation of the whole, acquire to those which attach to the whole. We must also distinguish with respect to the situations of the debts, or rather the locality of the debtors from whom they are owing, whether in the conquered country, in that of the conqueror, or in that of a neutral. If situated in the conquered territory, or in that of the conqueror, there is no doubt but that the conqueror may, by the rights of military occupation, enforce the collection of debts actually due to the displaced government, for the *de facto* government has, in this respect, all the powers of that which preceded it. But if situated in a neutral state, the power of the conqueror, being derived from force alone, does not reach them, and he

cannot enforce payment. It rests with the neutral to decide whether he will, or will not, recognize the demand as a legal one, or, in other words, whether he will regard the government of military occupation as sufficiently permanent to be entitled to the rights of the original creditor. He owes the debt, and the only question with him is, who is entitled to receive it? In deciding this question he will necessarily be determined by the particular circumstances of the case, and will probably delay his action till all serious doubts are removed. (*Real, Science du Gouvernement*, tome 5, ch. 2, sec. 5; *Wolfius, Jus Gentium*, cap. 7, §§ 833, 864; *Vattel, Droit des Gens*, liv. 3, ch. 14, § 213; *Burlamaqui, Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 8; *Phillimore, On Int. Law*, vol. 3, §§ 549–556; *Lauterbach, Colleg. Pandect.*, lib. 49, t. 15, § 7; *Pfeiffer, Das Recht. der Kreigseroberung*, pp. 109, 160; *Heffter, Droit International*, § 134.)

§ 28. If the debt, from whomsoever owing, be paid to the government of military occupation, and the conquest is afterward made complete, no question as to the legality of the payment can subsequently arise. But should the former sovereign or government, after a lapse of time, be restored, and the debtor has received his discharge, may the original creditor demand a second payment? The burthen of proof, in such a case, lies upon the debtor; and in order to render the payment valid, and make it operate as a complete discharge of the debt, he must show: 1st, that the sum was actually paid, for an acquittance or a receipt, without actual payment, is no bar to the demand of the original creditor; 2d, that the debt was actually due at the time when it was paid; 3d, that the payment has not been delayed by a *mora* on the part of the debtor, which had thus operated to defeat the claim of the original creditor. If the debtor be a citizen of the conquered country, or a subject of the conqueror, he must also show: 4th, that the payment was compulsory,—the effect of a *vis major* upon the debtor,—not necessarily extorted by the use of physical force, but paid under an order, the disobedience of which was threatened with punishment. If the debtor be a neutral or stranger, he cannot plead compulsion as a justification of his making payment to the conqueror, but he must also show: 5th, that the constitutional law of the

state recognized the payment, as made by him, to be valid; in other words, that it was made in good faith, and to the *de facto* authority authorized by the fundamental laws to receive it. It is not a necessary condition, but it is a substantive defense against the original creditor, that the money has been applied to his benefit; thus, in the case of a state creditor, if the money has been applied to the benefit of the state,—if there has been what the civilians term a *versio in rem*,—the payment will be regarded as valid. (*Phillimore, On Int. Law*, vol. 3, §§ 157, 158; *Klüber, Europ. Völkerrecht*, §§ 258, 259; *Pfeiffer, Das Recht der Kriegseroberung*, pp. 161-164; *Wolfius, Jus Gentium*, cap. 7, § 840; *Vattel, Droit des Gens*, liv. 3, ch. 5, § 77; *J. Voet, Com. ad Pandectas*, lib. 19, tit. 2, § 28; *Heffter, Droit International*, § 134.)

§ 29. The earliest historical example of the effect of military occupation or conquest, on the payment or cancelling of debts due the conquered state, is that of the hundred talents borrowed by the Thessalonians from Thebes, and remitted by Alexander, as has been stated in another chapter. This case, however, belongs rather to complete conquests, than to mere military occupation; for the debt not being paid, but remitted, as a *gift*, the validity of the gift could be sustained only on the ground that Alexander had become so entirely and absolutely master of Thebes, as to constitute him the heir and universal successor to the defunct and extinguished state. In the civil war between Cæsar and Pompey, the former remitted to the city of Dyrrachium, the payment of a debt which it owed to Caius Flavius, the friend of Decius Brutus. The jurists who have commented on this transaction, agree that the debt was not legally discharged; 1st, because in a civil war there could be, properly speaking, no *occupation*; and 2d, because it was a private and not a public debt. Another classical example was that of the confiscation of Rhodian houses and debts within the Syrian dominions, by Antiochus, king of Syria; but this was settled by the peace which provided for the *status quo ante belham*. (*Phillimore, On Int. Law*, vol. 3, §§ 561-563; *Quintilian, Inst. Oral.*, lib. 5, cap. 10; *Puffendorf, De Jur. Nat. et Gent.*, lib. 8, cap. 6, § 28; *Grotius, De Jur. Bel. ac Pac.*, lib. 3, cap. 8, § 4; *Albericus Gentilis, de Jure Belli*, lib. 3, cap. 5; *Cocceius, Gro-*

*tius Illustratus*, t. 8., pp. 202, 286; *Vattel, Droit des Gens*, liv. 8, ch. 14, § 212; *Polybius, Histor. Excerptae Legationes*, cap. 85; *Pfeiffer, Das Recht der Kriegseroberung*, pp. 165–180; *Heffler, Droit International*, § 134; *Tittman, Neber den Bund des Amph.*, p. 185; *Kamptz, Literatur, etc.*, § 807.)

§ 80. The first example in modern times, referred to by jurists, occurred in 1849. A Fleming lent a Frenchman a thousand crowns; the latter contrived to delay the payment until war broke out between Flanders and France, and then paid the money into the French treasury. After the peace the Fleming again demanded his debt, but the Frenchman defended himself by alleging the payment to the royal treasury. He, however, was condemned to pay back so much of the thousand crowns as he should be proved to have expended to his own benefit; in other words, the court of his own country relieved him only to the extent of the sum actually paid to the sovereign of the debtor. The fraudulent *mora* does not seem to have entered into the judicial investigation of this case. In a war between Pisa and Florence, toward the close of the fifteenth century, the former compelled, by threats of punishment, its subjects, who were debtors to Florentine subjects, to pay their debts into the Pisan treasury. A Pisan debtor, named Ludovicus, who had so paid his debt, was nevertheless sued for it by his Florentine creditor; the question was referred to Philip Decius, a Milanese jurist of the highest reputation, who, reciting the premises, concludes: “Ex quibus omnibus concludo et indubitanter existimo, quod Ludovicus mediante tali solutione fuerit liberatus.” In the year 1495, when Charles VIII. of France overran Italy, and temporarily replaced the house of Anjou upon the throne of Naples, the debts due to the state from the opposite faction were called in, as a means of enriching the Angevin party. Some of the debtors paid honestly the full amount of their debts; others paid a portion, and obtained a receipt in full; others again obtained a written discharge, without paying anything. Four months afterward, Ferdinand of Arragon was restored to power, and the French and Angevins driven out; and the validity of these payments and receipts was sharply contested. The opinion of Matthacus de Affictis, a jurist of the highest authority, was invoked, which concluded

in the following words: "*Prima conclusio*, quod illi debitores regum de Arregoniâ, qui fuerunt in morâ solvendi dictis regibus pecuniam debitam in genere, et jussu reys Caroli et suorum officialium solverunt ipsis donotariis *non sunt liberati*, et tenentur solvere dictis regibus, veris creditoribus. *Secunda conclusio* sit ista, quod illi debitores qui non fuerunt in morâ solvendi dictis creditoribus, sed jussi fuerunt ab officialibus regis Franciæ, quod solvant illis Gallis, virtute largitatis regis, et ipsi fecerunt, quidquid eis fuit possibile, ut non solverent, et realiter eis solverunt propter jussum poenalem, et isti *sunt liberati*. *Tertia conclusio* sit esta, quod si debitor fuit in morâ, sed erat infra tempus purgandi moram, et infra illud tempus sed exactus ab illis Gallis jussu magistratûs, tunc solvendo Gallis perinde habetur, ac si non esset in morâ, et sic *erit liberatus*. *Quarta conclusio* sit ista, quod debitor, qui solvit Gallis illam pecuniam debitam regibus de Arragoniâ virtute jussus magistratus, cui non potuit resistere, et pecuniam illam debitam post diem solutionis faciendi erat solutum, quod ipsi debitores penes se retinebant pro expensis, occurrentibus in administratione officii nomine regio, si ipsam pecuniam Gallis solverunt, *sunt liberati*, etiam quod fuerunt in morâ. *Quinta conclusio* sit ista, quod illi debitores, qui solutionem probant per confessionem Gallorum publicam vel privatam, ita quod non probant veram numerationem pecuniæ eis factum, *non sunt liberati*, sed debent solvere veris creditoribus, quantum cunque, ostenderint dictum jussum. *Sexta conclusio*, quod illi debitores, qui se concordaverunt, et non ostendunt rerum solutionem in totum vel in partem, *non sunt liberati*. Exitus rei approbavit istas conclusiones." The case of the debtors of the Prince of Hesse-cassel, which has furnished such a fruitful subject for discussion by modern jurists, belongs rather to complete conquests than mere military occupation, and will, therefore, be considered in the next chapter. The only additional case in modern times, to which we shall here refer, occurred during the war between the United States and the republic of Mexico. The Messrs. Laurents, British subjects domiciled in Mexico, had purchased of the Mexican government, in 1847, certain church property, the sale of which had been previously authorized by a law of the Mexican congress. The contract of sale was duly signed by the Laurents as pur-

chasers, and by the agents of the government as the sellers, and the purchase money deposited in the hands of a banker, to await the execution of the conveyance by the proper government officer. By some neglect the instrument had not been signed, but the purchasers were in possession of the property, and the money still remained on deposit when the city of Mexico was captured by the American forces. This money was seized and confiscated by General Scott as the property of the Mexican government. On the return of peace the church reclaimed the property, and, on suit, recovered its possession from the Messrs. Laurents, not on the ground of a default of payment, but of illegality of sale. The Laurents then made reclamation against the United States for the money confiscated, as British subjects, before the joint commission of the two governments. The commissioners being unable to agree, the case was referred to the umpire, who decided that, according to the rules of international law, the claimants were, at least for the time being, to be regarded as Mexican citizens, and not British subjects. Their claim was, therefore, rejected. (*Paponius, Recueil d'Arrêts*, liv. 5, tit. 6, arrêt 2; *Phillimore, On Int. Law*, vol. 3, §§ 565–569; *Commission of Claims between U. S. and G. Britain*, pp. 120–160; *Philip Decius, Consilia*, cap. 25; *Matthæus de Afflictis, Decisiones Nap.*, Dec. 150; *Pfeiffer, Das Recht der Kriegserberung*, pp. 191–192.)

## CHAPTER XXXIII.

## RIGHTS OF COMPLETE CONQUEST.

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§ 1. As already remarked, the conqueror's title to immovable property taken from the enemy, may be completed in various ways, as, by a treaty of peace or of cession, by entire subjugation and the incorporation with the conquering state, by civil revolution and the consent of the inhabitants, or by the mere lapse of time and the inability of the former sove-

reignty to recover its lost possessions. We will proceed to consider these different modes of confirmation. The title to conquered territory is made complete by a treaty of peace, either by express provisions of cession, or by the implied condition of *uti possidetis*. If the stipulation of cession is introduced in the treaty, it is usual to require of the conqueror certain stipulations with respect to the inhabitants of the ceded conquered territory, in order to secure to them rights not guarantied by the positive law of nations. But the conqueror's title is equally made complete by the silent operation of a general treaty of peace, for, as the principle of *uti possidetis* is the basis of every such treaty, unless the contrary is expressed, the conquered territory remains with the conqueror, and his title cannot afterward be called in question. But, a treaty is not the only mode in which the rights of conquest are confirmed and made valid. If the state to which the conquered territory belonged is entirely subjugated, and its power destroyed, the title of the conqueror is considered complete from the date of the subjugation of the former sovereign owner. In this case there could be no treaty of cession or confirmation, for, by supposition, the former owner no longer exists as a sovereign state; it, therefore, can neither confirm nor call in question the conqueror's title. So, also, if the state to which the conquered territory belonged be so weakened by the war as to afford no reasonable hope of ever being able to recover its lost territory, but, from pride or obstinacy, it refuses to make any formal treaty of peace, although destitute of the requisite means of prolonging the contest; the conqueror is not obliged to continue the war in order to force the other party into a treaty. He may content himself with the conquest already made, and annex it to, or incorporate it with, his own territory. His title will be considered complete from the time he *proves his ability* to maintain his sovereignty over his conquest, and *manifests*, by some authoritative act, as of annexation or incorporation, *his intention* to retain it as a part of his own territory. Both of these requisites—*ability to maintain and intention to retain*—are necessary to complete the conquest; and the latter must be manifested by some unequivocal act, as annexation or incorporation, made by the sovereign author-



ity of the conquering state. Without some such authoritative act, the conquered territory is held by the rights of military occupation only, and not as a complete conquest. So far as neutrals are concerned, it belongs to the conquering state, but does not form a part of it. It is held by the right of possession and not by complete title, and is therefore subject to the rights of postliminy. Again, if the conquest be accompanied by a civil revolution and a change of internal government, as where a colony or province revolts against the former sovereign, and, with the assistance of the conqueror, establishes its own independence, and unites itself to the conqueror, the sovereignty of the former owner may be regarded as extinguished by the act of separation, independence and voluntary annexation or incorporation, and without a treaty of peace, or of cession. The new internal government so organized and recognized, acts for itself, independently of its former sovereign. Such cases, however, are of rare occurrence. In whatever way the conquest is completed, the institutions of the conquering power usually require some definitive act in order to annex or incorporate the conquered territory, so as to complete the conquest and perfect the title. In such cases no alienation to a third party can be made complete till the conquest itself is perfected by such definitive act. Thus, the President of the United States, when war is duly declared, may conquer and take possession of foreign territory, but the joint action of the president and senate is required to complete it by treaty, and congress alone can annex it, or incorporate it into the union. Without such act of treaty confirmation, or of lawful annexation or incorporation, the title to any conquest made by the United States would still be considered in international law as incomplete. (*Wildman, Int. Law*, vol. 1, p. 162; *Vattel, Droit des Gens*, liv. 3, ch. 13, § 201; *Wheaton, Elem. Int. Law*, pt. 2, ch. 4, § 5; *Flemming, et al. v. Page*, 9 Howard Rep., p. 603; *Real, Science du Gouvernement*, tome 5, ch. 2, sec. 5; *Heffler, Droit International*, §§ 69, 183, 178, 185; *Phillimore, On Int. Law*, vol. 3, §§ 568, et seq.; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 12; *Kamptz, Literatur, etc.*, § 312; *Cocceius, Grotius Illus.*, lib. 1, cap. 4, § 15; *Shaumann, Die Rechtl. Verhältnisse*; *Grotius, de Jur. Bel. ac Pac.*, lib. 3, ch. 6, § 4; *Meerman, Von*

*Dem Recht der Eroberung*, passim; *Klüber, Droit des Gens Mod.*, § 256; *Martens, Precis du Droit des Gens*, § 277; *Sirey, Recueil, etc.*, xvii. 1, 217; xxx. 1, 280; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 12; *Puffendorf, De Jure Nat. et Gent.*, lib. 8, ch. 6, § 20; *The Boedes Lust*, 5 Rob. Rep., pp. 233–251; *The Flotina*, 1 Dod. Rep., p. 450.)

§ 2. The conqueror who acquires a province or town from the enemy, acquires thereby the same rights which were possessed by the state from which it is taken. If it formed a constituent part of the hostile state, and was fully and completely under its dominion, it passes into the power of the conqueror upon the same footing. It is united with the new State upon the same terms on which it belonged to the old one; that is, with only such political rights as the constitution and laws of the new state may see fit to give it. It retains no political privileges or immunities, but may acquire those it never possessed before. In political rights it may be the gainer or the loser by the change; if from being a part of an absolute monarchy it becomes a part of a republic, its liberties will be enlarged, or, if the reverse, they will be restricted. But such restriction, in any case, must be in conformity with the rights of conquest and the laws of war. When New Mexico formed a part of the Mexican Republic, it enjoyed the right of representation in the Mexican congress; on the conquest of that territory by the arms of the United States, under Gen. Kearny, a clause was introduced into the new organic law for sending a representative to the Congress of the United States. This part of the organic law was disapproved by the president, and even without such disapproval, it was utterly inoperative, for this right of representation was a political right, which was lost by the very act of conquest, and could be restored to it only by the action of congress, after its permanent incorporation into the conquering republic. The case, however, is different where the enemy possessed only a quasi-sovereignty, or limited political rights, over the conquered province or town. The conqueror acquires no other rights than such as belonged to the state against which he has taken up arms. "War," says Vattel, "authorizes him to possess himself of what belongs to his enemy. If he deprives that enemy of the

sovereignty of a town or province, he acquires it, such as it is, with all its limitations and modifications. Accordingly, care is usually taken to stipulate, both in particular capitulations and in treaties of peace, that the towns and countries ceded shall *retain all their liberties, privileges and immunities*." But where such conquered provinces and towns have themselves taken up arms against him, thus making themselves directly his enemies, the conqueror may regard them as vanquished foes, and treat them precisely as he would treat other conquered territory. (*Vattel, Droit des Gens.*, liv. 3, ch. 13, § 199; *Grotius, de Jur. Bel. ac Pac.*, lib. 3, ch. 8, § 2; *Heffter, Droit International*, §§ 131, et seq.; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 12; *Real, Science du Gouvernement*, tome 5, ch. 2, sec. 5; *Cross v. Harrison*, 16 How. Rep., p. 194; *American Ins. Co. v. Canter*, 1 Peters Rep., p. 542; *Marcy to Kearny*, Jan'y 11th, 1847, Ex. Doc., No. 17, 31st Cong., 1st sess. H. R.)

§ 3. If the hostile nation be subdued and the entire state conquered, a question arises as to the manner in which the conqueror may treat it without transgressing the just bounds established by the rights of conquest. If he simply replaces the former sovereign, and, on the submission of the people, governs them according to the laws of the state, they can have no cause of complaint. Again, if he incorporate them with his former states, giving to them the rights, privileges and immunities of his own subjects, he does for them all that is due from a humane and equitable conqueror to his vanquished foes. But if the conquered are a fierce, savage and restless people, he may, according to the degree of their indocility, govern them with a tighter rein, so as to curb their "impetuosity, and to keep them under subjection." Moreover, the rights of conquest may, in certain cases, justify him in imposing a tribute or other burthen, either a compensation for the expenses of the war, or as a punishment for the injustice he has suffered from them. But if he attempts to reduce the conquered people to a state of absolute subjection, or slavery, there is no complete conquest, for the state of warfare between that nation and himself is perpetuated. The Scythians said to Alexander the Great: "There is never any friendship between the master and the

slave. In the midst of peace, the rights of war still subsist." (*Vattel, Droit des Gens.*, liv. 3, ch. 13, § 201; 2 *Curtius, History, etc.*, liv. 7, cap. 8; *Grotius, de Jur. Bel. ac Pac.*, lib. 3, caps. 8, 15; *Puffendorf, de Jur. Nat. et Gent.*, lib. 8, cap. 6, § 24; *Real, Science du Gouvernement*, tome 5, ch. 2, sec. 5; *Heffter, Droit International*, § 124; *Abegg. Untersuchungen, etc.*, p. 86.)

§ 4. We have already remarked, that when one belligerent acquires military possession of territory belonging to an enemy, the sovereignty and dominion of the latter is suspended. If such possession be retained till the completion or confirmation of the conquest, the temporary dominion thus acquired by the conqueror becomes full and complete, *plenum dominium et utile*. Moreover, this confirmation or completion of the conquest has, so far as ownership is concerned, a retroactive effect, confirming the conqueror's title from the date of the conquest, and, therefore, making definitively valid his acts of ownership—alienation included—during his military occupation. But it can hardly be said, that the confirmation of the conqueror's title, by such retroactive effect, changes the previous legal condition of the conquered territory, and especially in its external relations. That is, the confirmation of the conquest does not make it a part of the conquering state during the time it was held simply under the rights of military occupation. Thus, the duties imposed on foreign goods, imported into such territory during military occupation, may have been very different from those which the conqueror could have imposed upon the same goods, when imported into his own state; if the confirmation of the conquest made such territory, in all respects, a part of the conquering state, from the date of its military occupation, it would be necessary to refund the difference between the collections made in it, as simply a foreign conquered territory, and those which could have been made in it, as a constituent part of the conquering state. This could hardly be claimed. The true theory is, that the retroaction of complete conquest only goes so far as to give permanency to the acts of the conqueror, done during military occupation. (*Wildman, Int. Law*, vol. 1, p. 162; *Cross, et al. v. Harrison*, 16 Howard Rep., p. 164; *Vide Ante*, chapter xxii.)

§ 5. It is a general rule of international law that, on the transfer of territory by complete conquest or cession, the allegiance of the inhabitants of the conquered or ceded territory, is transferred to the new sovereign. Even the perpetual allegiance of the English common law yields to treaty, and it is held that when the king cedes by treaty, the inhabitants of the ceded territory become aliens. In the absence of express treaty stipulations, or legislation by the conqueror, the relations between the conquered and the conqueror, are determined by the law of nations, which establishes the general rule, that the allegiance of the conquered is transferred to the new sovereign. It was held by the early civilians that such transfer of allegiance was absolute and unconditional, unless otherwise provided by some treaty stipulation; but the rule, as now understood and interpreted, is more liberal and just towards the inhabitants of the conquered territory. Burlamaqui very justly remarks that, "the end of a just war does not always demand that the conqueror should acquire an absolute and perpetual right of sovereignty over the conquered. It is only a favorable occasion of obtaining it, and for that purpose there must be an *express or tacit consent* of the vanquished. Otherwise, the state of war still subsisting, the sovereignty of the conqueror has no other title than that of force, and lasts no longer than the vanquished are unable to throw off the yoke." It has been shown in the preceding chapter, that on mere military conquest, the conquered may, but do not necessarily, cease to be regarded as aliens to the government of the conqueror; that mere military occupation does not, of itself, transfer the allegiance of the inhabitants of the territory so occupied absolutely and unconditionally, to the conqueror. It only suspends their allegiance to their former sovereign, and imposes on them a *temporary or limited* allegiance to the government of military occupation. If the conquest is surrendered to the former owner, the temporary allegiance of the inhabitants ends with the temporary sovereignty of the conqueror, and the former owner, in recovering his sovereignty, recovers his claim to the allegiance of the inhabitants, and resumes the duty of protecting them. But, if the conquest is confirmed, the allegiance to the former sovereign is entirely severed, and that to the conqueror

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to the transfer of the allegiance of the inhabitants of conquered territory, as established by the present usage of nations, is more fully and correctly stated by Chief Justice Marshall, in delivering the opinion of the supreme court of the United States, as follows: "On the transfer of territory, the relations of its inhabitants with the former sovereign are dissolved; the same act which transfers their country, transfers the allegiance of those who remain in it." The allegiance of those who do not remain, of course, is not so transferred with the territory. In other words, they do not, by the transfer of the country, become the citizens or subjects of the conqueror, nor has he acquired any "absolute and perpetual right of sovereignty" over them. There is no "consent," either "express or tacit," on their part, in order to make the transfer of allegiance complete and binding. (*Puffendorf, de Jure Nat. et Gent.*, lib. 7, cap. 7, §§ 8, 4; *Vattel, Droit des Gens*, liv. 3, ch. 18, § 200; *Burlamaqui, Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 8; *Am. Ins. Co. v. Canter*, 1 Peters Rep., p. 542; *Flemming, et al. v. Page*, 9 Howard Rep., p. 608; *Inglis v. The S. S. Harbour*, 3 Peters Rep., p. 122; *M'Irvine v. Cox's Lessee*, 4 Cranch. Rep., p. 211; *Heffter, Droit International*, § 131; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 1; *Westlake, Private Int. Law*, § 27.)

§ 7. From the rule of international law, as thus announced by Chief Justice Marshall, it is deduced that the transfer of territory establishes its inhabitants in such a position toward the new sovereignty, that they may elect to become, or not to become, its subjects. Their obligations to the former government are cancelled, and they may, or may not, become the subjects of the new government, according to their own choice. If they remain in the territory after its transfer, they are deemed to have elected to become its subjects, and thus have consented to the transfer of their allegiance to the new sovereignty. If they leave, *sine animo revertendi*, they are deemed to have elected to continue aliens to the new sovereignty. The *status* of the inhabitants of the conquered and transferred territory, is thus determined by their own acts. This rule is the most just, reasonable and convenient, which could be adopted. It is reasonable on the part of the conqueror, who is entitled to know who become his

lic law. (*Am. Ins. Co. v. Canter*, 1 Peters Rep., p. 542; *M'Ilvaine v. Coxe's Lessee*, 4 Cranch. Rep., p. 211; *Inglis v. The S. S. Harbour*, 8 Peters Rep., pp. 122-126; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 1; *Westlake, Private International Law*, § 27; *Foelix, Droit Int. Privé.*, §§ 35, 86.)

§ 9. This modern and more benign construction of the law of nations, with respect to the allegiance of the inhabitants of conquered or ceded territory, as announced by Chief Justice Marshall, avoids all questions of the *right* of the one state to transfer, and of the other to claim, the allegiance of subjects of neutral states who are naturalized or domiciled in the territory transferred by conquest or treaty. All are alike aliens to the new sovereignty, if they elect to continue so, and all become its subjects, if it consents to receive them, and they, by remaining in the transferred territory, signify their election to become such. The new state has the same undoubted right to receive the voluntary allegiance of the subjects of a neutral power, who are naturalized or domiciled in the acquired territory, as of the subjects of that power when they voluntarily enter the state and become its citizens by the ordinary modes of naturalization. The former government, by the act of cession or confirmation of conquest, has relinquished all its claim to the allegiance of the inhabitants of the transferred territory, whether natives, naturalized citizens, or domiciled aliens. The old state, by the transfer of the territory, relinquishes its claim to the allegiance of its inhabitants, and the new state, by their tacit consent, receives them as its subjects. The neutral state can no more complain of the conqueror, for receiving as citizens, its subjects who were naturalized by the conquered state, than it had to complain of the latter for naturalizing them. Naturalization by conquest and incorporation, can no more be complained of than naturalization by any other mode, so long as it is voluntary on the part of the person naturalized. And the transfer of allegiance, by the rule of domicile, or *animo manendi*, in the conquered territory, is certainly voluntary on the part of those who so remain. (*Am. Ins. Co. v. Canter*, 1 Peters Rep., p. 542; *M'Ilvaine v. Coxe's Lessee*, 4 Cranch. Rep., p. 211; *Inglis v. The S. S. Harbour*, 8 Peters Rep., pp. 122-126; *Dubois Case*, 1 Martin Rep., p. 285; *United States v.*

§ 11. It may be laid down as a general rule, that the inhabitants of a conquered territory who remain in it, become citizens of the new state; for justice would seem to require that the rights of citizenship should be given them in return for their allegiance. But this general rule of justice must yield to the conditions upon which the conquered are incorporated into the new state, and to the peculiar character of the institutions and municipal laws of the conqueror. It could not reasonably be expected that the conquering state would modify or change its laws and political institutions by the mere act of incorporating into it the inhabitants of a conquered territory. The inhabitants so incorporated, therefore, may, or may not, acquire all the rights of citizens of the new government, according to its constitution and laws. It may, and sometimes does, happen, that a certain class of the citizens of the conquered territory are, by the laws of the new state, precluded from ever acquiring the full political rights of citizenship. This is the necessary and unavoidable result of the different systems of law which prevail in different states. Thus, certain persons who were citizens of Mexico, in California and New Mexico, on the transfer of those territories to the United States, by the treaty of Guadalupe-Hidalgo, never have and never can become citizens of the United States. Such citizenship is repugnant to the federal constitution and federal organization. Nevertheless, they may be citizens of California or New Mexico, according to the local constitutions and laws which those countries have already adopted, or which they may hereafter adopt. (*Dred Scott v. Sandford*, 19 Howard Rep., p. 893; *Talbot v. Janson*, 3 Dallas Rep., pp. 153, 154; *Am. Ins. Co. v. Canter*, 1 Peters Rep., p. 542.)

§ 12. As has already been remarked, the laws of different countries with respect to the relations between the conqueror and the inhabitants of an acquired conquered territory, are very different. The rules of English law on this subject are, that "a country conquered by the British arms becomes a dominion of the king in the right of his crown, \* \* \* that the conquered inhabitants once received under the king's protection, become subjects, and are to be universally considered in that light, not as enemies or aliens."



United States, has a right to vote for representatives in congress and other public officers, who is qualified to fill offices under the federal government, and who may sue and be sued as a citizen of the United States. There can be little or no doubt that the inhabitants of Florida, as intimated by Chief Justice Marshall, were entitled, without the treaty stipulation, to the "privileges, rights and immunities" of citizens, in this more extended sense of the term; but their right to be incorporated in the union and participate in political power, was derived from the treaty, and not a necessary consequence, under the law of nations, of the transfer of their country and of their allegiance. Their political power under the federal constitution and the laws of the United States, resulted from the admission of Florida into the union as a state, and the political rights of citizenship of the United States thereby acquired, were determined and limited, with respect to age, sex, color, and condition, by our institutions and laws. It must also be remarked that a man may become a citizen of the United States without being a citizen of any particular state, or may become a citizen of a particular state without being a citizen of the United States. (*U. S. Statutes at Large*, vol. 8, pp. 256, 257; *American Ins. Co. v. Canter*, 1 Peters Rep., p. 542; *Talbot v. Jansen*, 3 Dallas Rep., pp. 152, 153; *Lynch v. Clarke*, 1 Sandford Rep., pp. 644-646; *Dred Scott v. Sandford*, 19 Howard Rep., pp. 405, 406.)

§ 14. "The laws of a conquered country," says Lord Mansfield, "continue in force until they are altered by the conqueror; the absurd exception as to pagans, mentioned in Calvin's case, shows the universality and antiquity of the maxim. For that distinction could not exist before the christian era, and in all probability arose from the mad enthusiasm of the crusades." This may be said of the municipal laws of the conquered country, but not of its political laws, or the relations of the inhabitants with the government. The rule is more correctly and clearly stated by Chief Justice Marshall, as follows: "On the transfer of territory, it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved, and new relations are created between them and the government which has acquired their

cannot make any change contrary to fundamental principles; that he cannot, for instance, exempt the inhabitants of the conquered territory from the power of parliament, or the laws of trade, or give them privileges exclusive of his other subjects. Thus, Ireland received the laws of England by the charters and commands of Henry II., John, Henry III., Edward I., and the subsequent kings, without the interposition of the parliament of England. The same is said of Wales, Berwick, Gascony, Guienne, Calais, Gibraltar, Minorca, etc. So, of New York; after its conquest from the Dutch, Charles II. changed its constitution and political government by *letters patent* to the Duke of York. If the king comes to a kingdom by conquest, he may change and alter the laws of that kingdom; but if he comes to it by title and descent, he cannot change the laws of himself without the consent of parliament. The constitutions of most English provinces, immediately under the king, have arisen not from grants, but from commissions to governors to call assemblies. In 1722, Sir Philip Yorke and Sir Clement Wearge reported on the assembly of Jamaica's withholding the usual supplies, that "If Jamaica was still to be considered a *conquered island*, the king had a right to levy taxes upon the inhabitants; but if it was to be considered in the same light as the other *colonies*, no tax could be imposed on the inhabitants but by an *assembly of the island*, or by an *act of parliament*." They considered, says Lord Mansfield, the distinction in law as clear, and an indisputable consequence of the island being in the one state or in the other. Whether it remained a conquest, or was made a colony, they did not examine. A maxim of constitutional law, as declared by all the judges in Calvin's case, and which to such men, in modern times, as Sir Philip Yorke and Sir Clement Wearge, took for granted, will require some authorities to shake. But, on the other side, no book, no saying, no opinion has been cited, and no instance in any period of history produced, where a doubt has been raised concerning it. (*Campbell v. Hall*, 1 Cowper Rep., p. 205; *Fabrigas v. Mostyn*, 1 Cowper Rep., p. 165; *Calvin's Case*, Coke Rep. part 7; *Callett v. Lord Keith*, 2 East. Rep., p. 260; *Blankard v. Guldry*, 2 Salkeld. Rep., p. 411; *Bowyer*, *Universal Public Law*, ch. 16, p. 158.)

§ 16. The right of the king to change the laws of a conquered territory, after the war, results, according to the decisions of English courts, from his constitutional power to make a treaty of peace, and consequently to yield up the conquest, or to retain it upon whatever terms he pleases, provided those terms are not in violation of fundamental principles. But the President of the United States can make no treaty without the concurrence of two-thirds of the senate, and his authority over ceded conquered territory, though derived from the law of nations, is limited by the constitution and subordinate to the laws of congress. It, however, is well settled by the supreme court, that, as constitutional commander-in-chief, he is authorized to form a civil or military government for the conquered territory during the war, and that when such territory is ceded to the United States, as a conquest, the existing government, so established, does not cease as a matter of course or as a consequence of the restoration of peace; that, on the contrary, such government is rightfully continued after the peace, and till congress legislates otherwise; but, that the President may virtually dissolve this government by withdrawing the officers who administer it; *provided*, he does not thereby neglect his constitutional obligation "to take care that the laws be faithfully executed." He is bound, for example, to prevent the landing of foreign goods in the United States out of any collection district and without the payment of duties, and to do this he must employ the constitutional means at his disposal. He may do this through the government which he had established during the war, by the right of conquest, and which existed when that conquest was ratified by peace, or, if he dissolve that government, the constitutional obligation remains to be performed by other means. So long as that government continues, with the express or implied sanction of the president, it represents the sovereignty of the United States, and has the legal authority to enforce and execute the laws which extend over such territory. Congress may, at any time, put an end to this government of the conquered territory, and organize a new one; or it may permit the people of such territory to form a constitution, and admit it as a new state into the union. The power of congress over such territory is clearly exclusive and

universal, and their legislation is subject to no other control or limit than the stipulations of cession and the constitution. But, connected with these general rights and powers of congress, there are also obligations and duties. These are to be ascertained from the law of nations, the stipulations of cession, and the principles of the federal constitution. But so long as neither congress nor the President direct otherwise, the government established during the war, and existing on the restoration of peace, continues with the implied consent of both. "The right inference," says Mr. Justice Wayne, in delivering the unanimous opinion of the supreme court, "from the inaction of both, is, that it was meant to be continued until it had been legislatively changed. No presumption of a contrary intention can be made. Whatever may have been the cause of delay, it must be presumed that the delay was consistent with the true policy of the government." California and New Mexico were acquired by conquest, confirmed by cession. During the war they were governed as conquered territory under the law of nations, and in virtue of the belligerent rights of the United States as the conqueror, by the direction and authority of the president, as commander-in-chief. By the ratification of the treaty of Guadalupe-Hidalgo, on the 20th of May, 1848, they became a part of the United States, as ceded conquered territory. The civil governments, established in each during the war, and existing at the date of the treaty of peace, continued in operation after that treaty had been ratified. California, with the assent and coöperation of the existing government, formed a constitution, which was ratified by its inhabitants, and a state government was put in full operation in December, 1849, with the implied assent of the President, the officers of the existing government of California publicly and formally surrendering all their powers into the hands of the newly constituted authorities. The constitution so formed and ratified was approved by congress, and California was, on the 9th of September, 1850, admitted into the union as a state. New Mexico also formed a constitution, and applied to congress for admission as a state; the application was not granted; but, on the 9th of September, 1850, New Mexico and the part of California not included within the limits of the new

constitution. In the latter case, the local government, acting under the direction of the president, represents the sovereignty of the United States, to which the territory has passed. And, as that sovereignty is the United States, under the federal constitution, no powers can be exercised in that territory, either by the president, or by congress, which are opposed to the federal constitution, and it necessarily follows that the inhabitants of such territory, acquire, immediately on its becoming a part of the United States, the privileges, rights, and immunities guaranteed by the constitution. They do not, indeed, thereby acquire the political rights of *citizens*, entitling them to vote for representatives in congress, or to sue and be sued in the federal courts; but they thereby become privileged as subjects of the United States, and no powers opposed to the federal constitution can be exercised over them; they owe an allegiance to the government of the United States, and are entitled to its protection. (*Calvin's Case*, Coke Rep., part 7; *Campbell v. Hall*, 1 Cowper Rep., p. 204; *Cross, et al. v. Harrison*, 16 Howard Rep., p. 166; *Dred Scott v. Sandford*, 19 Howard Rep., p. 293.)

§ 18. We have already remarked, that the relations of the inhabitants of the conquered territory, *inter se*, are not, in general, changed by the act of conquest and military occupation; nevertheless, that the conqueror, exercising the powers of a *de facto* government, may suspend or alter the municipal laws of the conquered territory, and make new ones in their stead. Such changes are of two kinds, viz: those which relate to a suspension of civil rights and civil remedies, and the substitution of military laws, and military courts and proceedings; and those which relate to the introduction of new municipal laws, and new legal remedies and civil proceedings. There can be no doubt that when the war ceases, the inhabitants of the ceded conquered territory cease to be governed by the code of war. Although the government of military occupation may continue, the rules of its authority are essentially changed. It no longer administers the laws of war, but only those of peace. The governed are no longer subject to the severity of the code military, but are remitted to their rights, privileges, and immunities, under the code civil. Hence, any laws, rules, or regulations introduced by

whether it has been tacitly adopted by the conqueror, we must look to the character of its provisions, and compare them with the laws and institutions of the conquering state: that is, with the will of the conqueror as *expressed* by himself in similar matters. Whatever is in conflict with, or directly opposed to such expressions of his will, we cannot presume to have been adopted by his tacit consent. Hence, Lord Coke says, if a christian king should conquer an infidel country, the laws of the conquered, *ipso facto*, cease, because it is not to be presumed that a christian king has adopted the laws of an infidel race. But, where there is no such conflict in the institutions and laws of the two countries, those of the conquered which regulate personal relations, commercial transactions, and property in all its modes of transfer and acquisition, are presumed to have been adopted as a matter of convenience. This rule of international law is both reasonable and just. Each case must rest upon its own basis, and be judged of by its own circumstances. From this view of the jurisprudence of the conquered country, we must determine what laws of the acquired territory remain in force, and what laws of the conqueror, *proprio rigore*, extend over such territory. (*Calvin's Case*, Coke Rep., pt. 7; *Gardiner v. Fell*, 1 Jacob & Walk. Rep., p. 22; *Cross, et al. v. Harrison*, 16 Howard Rep., p. 165; *Collet v. Lord Keith*, 2 East. Rep., p. 260; *Blankard v. Guld*, 4 Mad. Rep., p. 225.)

§ 20. The English courts make a distinction between ceded or conquered territory, and territory acquired by discovery, or occupancy, and peopled by the discoverer. British colonists are considered as carrying with them such laws of their sovereign as are beneficial to the colony and applicable to the new condition of the colonists; but penal laws, inflicting forfeitures and disabilities, laws of tithes, bankruptcy, mortmain, and police, do not extend to colonies not *in esse*. And laws passed after the settlement of a discovered or occupied country do not affect such colony, without special provisions to that effect, unless they relate to the exercise of the powers of the sovereign with regard to foreign relations, navigation, trade, revenue, and shipping. But the rule is different with respect to territory acquired by cession or conquest, for the municipal laws of such territory at the time of its acquisition

remain till changed by competent authority, and the subjects of the new sovereignty who enter such newly acquired territory do not, in general, carry with them the laws of their sovereign; but with respect to their rights and relations *inter se*, they are in the same condition as the inhabitants of such territory; that is, they are governed by the laws and usages of the country at the time of the conquest or session. "Whoever purchases, lives, or sues there, puts himself under the laws of the place; an Englishman in Ireland, Minorca, the Isle of Man, or the Plantations, has no privilege distinct from the natives." (*Dwarris on Statutes*, pp. 905, 527, 906; *Att'y Gen'l v. Stewart*, 2 Meriv. Rep., p. 143; *Darnes v. Painter*, Freeman Rep., p. 175; *Hall v. Campbell*, 1 Cowper Rep., p. 208; *Blackstone, Com.*, vol. 1, p. 102; *Bowyer, Universal Public Law*, ch. 16, p. 158; *Clarke, Colonial Law*, p. 4.)

§ 21. There can be no doubt of this *general* principal of English common law—that the inhabitants of territory acquired by cession or conquest, are governed in their relations *inter se*, by the municipal laws of such territory in force at the time of the cession or conquest, and that statutes previously passed do not, in general, extend *proprio vigore* over such territory; nevertheless, it is equally true that *some* of the laws of the new sovereignty do extend over such newly acquired territory, and that the existing municipal laws of such territory are, in some degree, modified and changed by the acts of acquisition, and without any special decree, or statute, of the executive or legislative departments of the new sovereignty. Thus, any municipal laws existing in such territory, which are in violation of treaty stipulations with foreign nations, or of the general laws of trade, navigation and shipping, or which give privileges exclusive of other subjects, are not only void in themselves, but the king even cannot introduce any which are contrary to fundamental principles. However absurd the exception as to pagans, mentioned in Calvin's case, there can be no doubt of the correctness of the general rule, that the laws of the conquered territory which are contrary to the fundamental principles of the government of the conqueror, cease, on the complete acquisition of the conquered territory, because they are opposed to the *already expressed will* of the conqueror. All other mu-

nicipal laws continue in force till changed by the same will subsequently expressed; that is, the king *himself* may change these laws, or he may, by his *charters* and *commands*, authorize the conquered country to do so. Such authority is derived directly from the crown, and without the interposition of parliament. (*Bowyer, Universal Public Law*, ch. 16; *Campbell v. Hall*, 1 Cowper Rep., p. 205; *Fabrigas v. Mostyn*, 1 Cowper Rep., p. 165; *Gardiner v. Fell*, 1 Jacob & Walk. Rep., pp. 27, 30, note; *Att'y Gen'l v. Stewart*, 2 Merivale Rep., p. 159.)

§ 22. The supreme court of the United States, where questions of this kind have come before that tribunal, have adopted the decisions of the English courts, so far as applicable to our system of government. While recognizing the general principle that the laws of the conquered territory remain in force after the cession, they distinctly assert that the ceded territory becomes instantly bound and privileged by the laws which congress has previously passed to raise revenue from duties on imports and tonnage; and that such territory is subject to the acts of congress, previously made to regulate foreign commerce with the United States, without other special legislation declaring them to be so. And although congress may not have established collection districts or custom houses, or authorized the appointment of officers to collect the revenue accruing upon the importation of foreign dutiable goods into that territory, nevertheless, it may be legally demanded and lawfully received by the officers of the government, which was organized in such territory by the right of conquest, and existing at the date of the cession. California became a part of the United States as a ceded conquered territory, by the treaty which was ratified on the 30th of May, 1848; but the act of congress, including San Francisco within one of the collection districts of the United States, was not passed till the 3d of March, 1849, and the collector authorized by law to be appointed for that port did not enter upon the duties of his office till the 13th of November, 1849. The ratification of the treaty was not officially announced in California till the 17th of August, 1848. The civil government of California, which had been organized during the war, by right of conquest and military



occupation, continued to collect duties under the war tariff till officially notified of the ratification of the treaty of peace; it then declared that "the tariff of duties for the collection of military contributions will immediately cease, and the revenue laws and tariff of the United States will be substituted in its place," and continued to enforce these laws and to collect the revenue accruing under them upon the importation of foreign dutiable goods into California, until the 18th of November, 1849, when the collector, duly appointed under the authority of an act of congress, entered upon his duties. The importers of such dutiable goods denied the legality of these collections, and protested against the exaction of duties, and subsequently brought suit against the officers of the civil government to recover the moneys so collected, with interest. The legality of the acts of these officers was sustained by the unanimous opinion of the supreme court of the United States; and Mr. Justice Wayne, in delivering the opinion of the court, said, that the officers, in coercing the payment of dutiable goods landed in California, "had acted with most commendable integrity and intelligence." (*Cross, et al. v. Harrison*, 16 Howard Rep., p. 201; *Dunlop, Digest of Laws of U. S.*, pp. 1214, 1215; *Brighly, Digest of Laws of U. S.*, p. 115; *U. S. Statutes at Large*, vol. 9, p. 400.)

§ 23. There is one point in this decision deserving of particular notice, with respect to the operation of laws which extend, *proprio vigore*, over ceded conquered territory. A statute law of the United States, when no time is fixed in the law itself, takes effect in every part of the Union from the very day it is passed. Not so, however, with the operation of existing revenue laws over newly acquired territory, which, though a part of the United States, is not within the Union. As already remarked, nearly three months elapsed between the ratification of the treaty of cession and its official announcement in California. During that interval, tonnage and impost duties were imposed and collected according to the *war tariff*, instead of the tariff of the United States. If the revenue laws extended over California, *eo instante*, on the ratification of the treaty by which that territory was acquired, these duties were unlawfully collected. It was so claimed

by those who had paid them, and suit was brought for their recovery. But Mr. Justice Wayne, in delivering the opinion of the supreme court on this question, remarked: "It will certainly not be denied that these instructions [imposing the war tariff] were binding upon those who administered the civil government in California, *until* they had notice from their own government that a peace had been finally concluded. Or that those who were locally within its jurisdiction, or who had property there, were not bound to comply with those regulations of the government, which its functionaries were ordered to execute. Or that any one would claim a right to introduce into the territory of that government foreign merchandise, without the payment of duties which had been originally imposed under belligerent rights, *because the territory had been ceded by the original possessor and enemy to the conqueror*. Or that the mere fact of a territory having been ceded by one sovereignty to another, opens it to a free commercial intercourse with all the world, as a matter of course, until the new possessor has legislated some terms upon which that may be done. There is no such commercial liberty known among nations, and the attempt to introduce it in this instance, is resisted by all of those considerations which have made foreign commerce between nations conventional. The treaty that gives the right of commerce, is the measure and rule of that right. *Vattel*, liv. 1, ch. 8, § 93. The plaintiffs in this case claim no privilege for the introduction of their goods into San Francisco, between the ratifications of the treaty with Mexico and the official announcement of it to the civil government in California, other than such as that government permitted under the instructions of the government of the United States." (*Kent, Com. on Am. Law*, vol. 1, pp. 454-459; *Mathews v. Zane*, 7 Wheaton Rep., p. 104; *The Ann*, 1 Gallison Rep., p. 62; *Cross, et al. v. Harrison*, 16 Howard Rep., pp. 191, 192.)

§ 24. It has already been remarked that, in the transfer of territory by conquest or cession, the *political* rights of its inhabitants may be essentially changed. This results from a difference in the powers and character of governments, as depending upon their constitutions or fundamental laws. The new government may not be capable of receiving or exercise-

ing all the powers of the old one, or it may not extend to the governed all the political rights which they enjoyed under the former sovereign. But a change of sovereignty is not, in modern times, permitted to effect any change in the rights of private property. What was the property of the former sovereign becomes the property of the new one, and what was the property of individuals before, remains private property, notwithstanding the conquest or cession. "The modern usage of nations," says Chief Justice Marshall, speaking of the transfer of a country from one government to another, "which has become a law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world, would be outraged, if private property should be generally confiscated, and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property, remain undisturbed." The rule of international law, thus clearly enunciated by the supreme court of the United States in 1833, has since been repeatedly recognized in the decisions of the same tribunal. (*United States v. Perchman*, 7 Peters Rep., p. 87; *Mitchel v. The U. S.*, 9 Peters Rep., p. 734; *Strother v. Lucas*, 12 Peters Rep., p. 38; *New Orleans v. The U. S.*, 10 Peters Rep., pp. 720, 729; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 12.)

§ 25. As the new state merely displaces the former sovereignty, and acquires, by cession or complete conquest, no claim or title whatever to private property, whether of individuals, municipalities, or corporations, and, as it assumes the duties and obligations of the former sovereign with respect to private property within such acquired territory, it is consequently bound to recognize and protect all private rights in lands, whether they are held under absolute grants or inchoate titles, for *property* in land includes every class of claim to real estate, from a mere inceptive grant to a complete, absolute, and perfect title. A mere equity is protected by the law of nations as much as a strictly legal title. In the words of Chief Justice Marshall, "The term 'property,' as applied to lands, comprehends every species of title, inchoate or complete. It is supposed to embrace those rights

which lie in contract; those which are executory; as well as those which are executed. In this respect the relation of the inhabitants to their government is not changed. The new government takes the place of that which has passed away." (*Soulard et al. v. The United States*, 4 Peters Rep., p. 512; *Mitchel et al. v. The United States*, 9 Peters Rep., p. 733; *United States v. Perchman*, 7 Peters Rep., p. 51; *Chouteau's heirs v. The United States*, 9 Peters Rep., pp. 137, 147.)

§ 26. There can be no question of the correctness of the rule of international law as thus laid down by Chief Justice Marshall, and repeated in numerous decisions of the supreme court of the United States. It not unfrequently happens, however, that much injustice and inconvenience will result to the owners of property in a ceded or conquered territory, by the transfer of themselves and their property from one system of laws to another very different from the first, and wholly inadequate to afford remedies for a violation of the rights of property. And as the law of nations and the usage of the civilized world impose upon the new sovereignty the duty to maintain and protect the property of the conquered inhabitants, it is bound to take the necessary steps to clothe equities with a legal title, so as to bring them within the scope of legal remedies under its own laws. It is with this view that congress has usually passed remedial acts for the ascertainment and recognition of lands of private ownership in territories acquired by the United States. Although the maintenance of such property may be fully guaranteed by the law of nations and the stipulation of treaties, yet, in order to place it under the careful guardianship of our municipal laws, it is necessary to invest with a new attribute of a legal title, without which the owner may be unable either to maintain his own possession or eject an intruder. For example, a right or title to lands which, under Spanish or Mexican law, is abundantly sufficient for the security and protection of the owner in his rights, may be utterly useless for such purposes under our laws, as it neither secures him in the possession and enjoyment of his property, nor enables him to bring a suit to eject an aggressor. A refusal or neglect to pass the necessary remedial acts in such cases so as to invest equities with such

*Cæcilius, Grotius Illus.*, lib. 1, cap. 4, § 15; *Schwarz, De J. Victoris, etc.*, thes. 27.)

§ 28. When the allied powers of Europe overthrew the dynasty of Napoleon, and restored to the countries which he had subdued, their legitimate sovereigns, no general provision was made in the peace of Paris for the protection of rights acquired under the *de facto* rulers, (the amnesty provided for in the 27th article being limited in its extent,) nevertheless, reason, good sense, and the law of nations, were generally allowed to prevail, and rights and titles so acquired, were left undisturbed. The only exceptions were confined to one or two small German states, and these were considered as most discreditable to the petty sovereigns who made them. The most noted of these was the prince of Hesse-cassel, who was driven from the electorate in 1806, and not restored till about the beginning of 1814. His country had remained about a year under the military government of Napoleon, and was then incorporated into the newly formed kingdom of Westphalia, of which Jerome Bonaparte was recognized as king, by the peaces of Tilsit and Schönbrunn. On his return to his hereditary dominions, in 1814, the prince refused to recognize the validity of the alienations of the domains of his country, which had taken place under the *de facto* governments, since his expulsion, in October, 1806; the purchasers of these lands were deprived of their possessions which they had purchased and paid for in good faith, and which had been delivered to them with every formality of law. The supreme court of appeal, in Cassel, was stopped by an *inhibitorium* from taking cognizance of the matter, and the unfortunate proprietors were, in some instances, driven from their possessions by a troop of the elector's hussars. They appealed in vain for protection to the congress of Vienna; Prussia, through the mouth of her chancellor, Prince Von Hardenberg, declared in their favor; but the other nations represented in that congress, gave no heed to the complaints made against a prince whom they had just restored to power. Resort was then had to the german confederation but this modern Amphictyonic assembly, either could not, or would not, interfere between a sovereign prince and his own subjects. Public jurists, however, have not failed

to condemn the conduct of the elector, as contrary to law and justice. His pretext for denying the validity of these alienations, was mainly founded upon the "*lex de captivis et postliminio*" of the Roman law; but it was readily shown that this law could not be applied directly, and that the argument deduced from its *analogy* was adverse to his position. He virtually acknowledged the weakness of his case, by refusing to arbitrate the question, or even to permit his own courts to take cognizance of it. (*Phillimore, On Int. Law*, vol. 3, §§ 573, 574; *Pfeiffer, Das Recht des Kriegseroberung*, p. 237; *Heffter, Droit International*, §§ 185, 186; *Schweikart, Napoleon und die Curh.*, pp. 60, et seq.; *Rotteck und Welcker, Staats Lexikon*, verb. *Domainenkauf*; *Conversations Lexikon*, verb. *Domainenverkauf*; *Koch, Hist. de Traité de Paix*, tome 3, p. 364; *Encyclopædia Americana*, verb. *Domain*, digest, xlix. t. xv. 12, 8.)

§ 29. The Prince of Hesse-Cassel, also denied the validity of the payment or cancellation of the debts which were owing to his government in 1806, and which had been paid or alienated prior to his restoration. Being absolute lord over his subjects, who were exceedingly poor, he had enriched himself by selling their valor and lives, to fight the battles of other sovereigns, and the gold thus acquired had been invested in his own name, as sovereign, in loans and mortgages, to the inhabitants of other states. On the conquest of Hesse-Cassel, by Napoleon, these debts were confiscated, and made payable only to the treasury of what was called the "*domaine extraordinaire*." And when the greater part of this Electorate was incorporated into the kingdom of Westphalia, a compact was entered into at Berlin, between king Jerome and Napoleon, for the division and adjustment of the debts owing to the extinguished electorate. The Bonapartes had no difficulty in collecting those due from the subjects of their newly-acquired dominions, for there force could be resorted to, in order to compel payment; but where the debtors resided in other states, the payment was in a measure voluntary, and even where the debtors were willing to pay, a difficulty occurred in releasing the mortgages, as the record could be canceled only by the authority of the creditor therein named. To remove this difficulty in the Duchy of Mecklenburg, the duke issued an order, *circular rescript*, on

the 15th of June, 1810, which, after reciting the complete conquest of Hesse-Cassel by Napoleon, and the extinguishment of the former sovereignty, directed the court of registration to record, as extinguished, those mortgages in favor of Hesse-Cassel on estates in that duchy, for which a discharge or receipt had been given by Napoleon, or by his appointee for that purpose. Among the estates so mortgaged and released, were those of a certain count Van Hahn, whose case acquired much celebrity and will serve to illustrate the fact and the law. After the death of the count and the restoration of the prince of Hesse-Cassel, the latter instituted proceedings as a creditor against his estate, denying the validity of the payment and the legality of the discharge of the mortgage. The first tribunals, (the university of Breslau in 1824, and that of Kiel in 1831,) decided, in substance, that the prince might recover that portion of the debt which had not been *actually paid* to Napoleon, and no more. Both parties being dissatisfied with this judgment, an appeal was taken to another university, (tribunal,) which learned body delivered at great length the reasons of their final decision, which was, in substance, that all the debts to Hesse-Cassel, for which discharges had been given in full by Napoleon, *whether the whole sum had been actually paid or not*, were validly and effectually canceled, and that the debtors could not be called upon to pay a second time. These learned jurists drew a broad distinction between the acts of a transient conqueror on mere military occupation, and those of one whose rights and titles had been ratified by the public acts of the state, and recognized in treaties with foreign powers. The judgments of the tribunals of Breslau and Kiel, were based on the supposition that the conquest was only a *temporary* one; but the learned judges said it was impossible to consider the return of the prince of Hesse-Cassel as a continuation of his former government. They rejected the consideration of the justice or injustice of the war, in which the electorate had been conquered, nor did they attach any importance to the fact, that the prince had carried away with him, and retained possession of, the instruments containing the written acknowledgment of the debtor. It will be noticed that this decision virtually confirms the validity of the alienation of domains made

by the *de facto* governments of the conquests of Napoleon. (Schweckart, *Napoleon und die Curh.*, pp. 8–104; Pfeiffer, *Das Recht der Kriegseroberung*, pp. 240–252; Heffler, *Droit International*, §§ 186, 188; Rotteck und Welcker, *Staatt's Lexikon*, tit. *Domainenkauf*; Zachariae, *ueber die Verpfüchtung, etc.*, b. iv, p. 104; *Conversations Lexikon*, tit. *Dominen*; *Encyclopedia Americana*, tit. *domain*; Phillimore, *On Int. Law*, vol. 3, §§ 568–572.)



## CHAPTER XXXIV.

## TREATIES OF PEACE.

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§ 1. It has been laid down as "an unquestionable proposition of international law that there is a legal as well as a moral necessity that, with the ceasing of the causes which justified the inception of the war, the war itself should cease." Vattel enforces the obligation to seek peace as the end of war, and argues that no matter how just the war may have been at the commencement, it must not be continued beyond its lawful object, which is to procure justice and

safety, and the moment an equitable compromise can be procured, it should cease. The obligation to accept a peace *sufficiently safe*, is also strenuously argued by Grotius. Other writers say that when, by use of the legal means of war, the invaded right has been obtained or secured, the injury redressed, or the threatened danger averted, the *abnormal* state of war *must* cease, and the *normal* state of peace *must* be reëstablished. Some, who advocate the general right of external intervention, deem it a most proper occasion to exercise that right, when a war, though lawfully begun, is unlawfully continued beyond the just objects of its inception. There are three ways by which a war may be concluded and peace restored: 1st, By the unconditional submission of one belligerent to another; 2d, By a *de facto* cessation of hostilities, and a *de facto* renewal of the relations of peace, by both belligerents; and 3d, By a formal treaty of peace. We shall here discuss only the latter. (*Vattel, Droit des Gens*, liv. 4, ch. 1, §§ 6, 7, 9; *Grotius, De Jur. Bel. ac Pac.*, lib. 3, ch. 25, § 3; *Phillimore, On Int. Law*, vol. 3, §§ 509, et seq.; *Bello, Derecho Internacional*, pt. 2, cap. 9, § 6; *Burlamaqui, Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 14; *Albericus Gentilis, De Legationibus*, lib. 3, cap. 1; *Zouch, De Jure, etc.*, part 2, sec. 9; *Wolfius, Jus Gentium*, cap. 8; *Kampts, Literatur des Voelk.*, §§ 321, 331; *Kent, Com. on Am. Law*, vol. 1, p. 165; *Wildman, Int. Law*, vol. 1, p. 139; *Rayneval, Inst. du Droit Nat.*, etc., liv. 3, ch. 21; *Heffler, Droit Internacional*, § 179.)

§ 2. The power to declare war does not necessarily include that of making a treaty of peace. These two powers are intimately connected, and the latter would seem naturally to follow the former. They are, therefore, generally associated together, though not always. In unlimited monarchies both reside in the sovereign; and even in limited or constitutional monarchies, both may be vested in the crown, yet the conditions of the treaty of peace may be such as to require its ratification by other authorities of the state. For, although the state may have intrusted to the prudence of her ruler the general authority to determine on war and peace, yet this power may be limited in many particulars by the fundamental law or constitution. A nation has the free disposal of its

own domestic affairs and form of government, and its sovereign power of making war and peace may be intrusted to a single person, or it may be divided among a number of persons. (*Wheaton, Elem. Int. Law*, pt. 4, ch. 4, § 1; *Kent, Com. on Am. Law*, vol. 1, p. 165; *Chitty, Com. Law*, vol. 1, p. 378; *Merlin, Répertoire, verb. Declaration de Guerre*; *Heffler, Droit International*, §§ 81, et seq.; *Vattel, Droit des Gens*, liv. 4, ch. 2, § 10; *The Hoop*, 1 Rob. Rep., p. 196.)

§ 8. Thus, Francis I., of France, attempted by the treaty of Madrid, to cede to the emperor Charles V. the province of Burgundy; but the states-general, under the constitution of the old French monarchy, declared that the king had no authority to alienate any part of the kingdom by a treaty of peace. The cession of the province of Burgundy was, therefore, annulled, as contrary to the fundamental laws of the kingdom. Under Richelieu and Louis XIV. the old feudal constitution of France was abolished, and all the powers of government concentrated in the hands of the king. Of the different constitutions established in France since the revolution of 1789, some have limited the power of concluding a peace, while others have vested it in the crown without any nominal limitation. Nevertheless, so long as the chambers exercise a legislative authority, they necessarily exercise an influence on the treaty-making power, in their right to refuse the passage of laws to carry such treaties into effect. In Great Britain, the treaty-making power, as a branch of the prerogative of the crown, has, in theory, no limits; but in the practical administration of the constitution this power is limited by the general controlling authority of parliament, which body can compel the crown to make peace by withholding the supplies necessary for carrying on the war, and its approbation is necessary to carry into effect a treaty by which the existing territorial arrangements of the empire are altered. In confederated governments, as already stated, the treaty-making power, and its extent, must depend upon the nature of the confederation and the formation and character of the government. By the constitution of the United States of America, the president has the exclusive power of making treaties of peace, which, when ratified with the advice and consent of the senate, become the supreme

law of the land, and have the effect of repealing all other laws of congress, or of the states, which stand in the way of their stipulations. But congress may, at any time compel the president to make peace by refusing the means of carrying on the war, and its approbation is necessary for the passage of any laws which might be required for carrying into effect the stipulations of such treaty. (*Wheaton, Elem. Int. Law*, pt. 4, ch. 4, § 2; *Story, On the Constitution*, b. 3, ch. 37; *Bello, Derecho Internacional*, pt. 2, cap. 9, § 6; *Chitty, Com. Law*, vol. 1, p. 378; *Blackstone, Com.*, vol. 1, p. 257; *The Hoop*, 1 Rob. Rep., p. 196.)

§ 4. A question much discussed in former times, was, whether a prisoner of war can make a treaty of peace? On this subject Vattel remarks: "Every legitimate government, whatever it may be, is established solely for the good and welfare of the state. This incontestible principle being once laid down, the making of peace is no longer the peculiar province of the king; it belongs to the nation. Now, it is certain that a captive prince cannot administer the government, or attend to the management of public affairs. How shall he, who is not free, command a nation? How can he govern it in such a manner as best to promote the advantage of the people, and the public welfare? He does not, indeed, forfeit his rights; but his captivity deprives him of the power of exercising them, as he is not in a condition to direct the use of them to its proper and legitimate end. He stands in the same predicament as a king in his minority, or laboring under a derangement of his mental faculties. In such circumstances, it is necessary that the person or persons whom the laws of state designate for the regency, should assume the reins of government. To them it belongs to treat of peace, to settle the terms on which it shall be made, and to bring it to a conclusion, in conformity to the laws. The captive sovereign may himself negotiate the peace, and promise what personally depends on him; but the treaty does not become obligatory on the nation till ratified by itself, or by those who are invested with the public authority during the prince's captivity, or, finally, by the sovereign himself after his release." (*Vattel, Droit des Gens*, lib. 4, ch. 2, § 13; *Wolfius, Jus Gentium*, § 982; *Bello, Derecho Internacional*, pt. 2, cap. 9, § 6.)

§ 5. Another question of much greater practical difficulty, is the limitation of the treaty-making power, expressed or implied, in the fundamental law or constitution of the state. The general authority to make treaties of peace, necessarily implies the power to stipulate the conditions of peace; and among these may properly be involved the cession of the territory and other property of the state, as well as the right of sovereignty or *jus eminens* over private property. "If, then," says Wheaton, "there be no limitation expressed in the fundamental laws of a state, or necessarily implied from the distribution of its constitutional authorities, on the treaty-making power in this respect, it necessarily extends to the alienation of public and private property, when deemed necessary for the national safety or policy." "There can be no doubt," says Kent, "that the power competent to bind the nation by treaty, may alienate the public domain and property by treaty. If a nation has conferred upon its executive department, without reserve, the right of treating and contracting with other states, it is considered as having invested it with all the power necessary to make a valid contract. That department is the organ of the nation, and the alienations by it are valid, because they are done by the reputed will of the nation. The fundamental laws of a state may withhold from the executive department the power of transferring what belongs to the state; but if there be no express provision of that kind, the inference is that it has confided to the department charged with the power of making treaties, a discretion commensurate with all the great interests, wants and necessities of the nation. A power to make treaties of peace, necessarily implies a power to decide the terms on which they shall be made; and foreign states could not deal safely with the government on any other presumption. The power that is entrusted generally and largely with authority to make valid treaties of peace, can, of course, bind the nation by alienation of part of its territory; and this is equally the case, whether that the territory be already in the occupation of the enemy, or remains in the possession of the nation, and whether the property be public or private." The right of making peace, says Vattel, "authorizes the sovereign to dispose of things even belonging to private persons,

and the eminent domain gives him this right." (*Vattel, Droit des Gens*, liv. 1, ch. 20, § 244; ch. 21, § 262; liv. 4, ch. 2, §§ 11, 12; *Kent, Com. on Am. Law*, vol. 1, pp. 166, 167; *Wheaton, Elem. Int. Law*, pt. 4, ch. 4, § 2; *Bello, Derecho Internacional*, pt. 2, cap. 9, § 6; *Real, Science du Gouvernement*, tome 5, ch. 8, sec. 5; *Grotius, De Jur. Bel. ac Pac.*, lib. 3, ch. 20, § 7; *The Schooner Peggy*, 1 Cranch. Rep., p. 103; *Ware v. Hilton*, 3 Dallas Rep., p. 199.)

§ 6. With respect to the duty of the state to make compensation to individuals, and the limits to that duty, the remarks of Wheaton are peculiarly appropriate and just. "The duty," he says, "of making compensation to individuals, whose private property is sacrificed to the general welfare, is inculcated by public jurists, as correlative to the sovereign right of alienating those things which are included in the eminent domain; but this duty must have its limits. No government can be supposed to be able, consistently with the welfare of the whole community, to assume the burden of losses produced by conquest, or the violent dismemberment of the state. Where, then, the cession of territory is the result of coercion and conquest, forming a case of imperious necessity beyond the power of the state to control, it does not impose any obligation upon the government to indemnify those who may suffer a loss of property by the cession." The history of the state of New York furnishes a strong illustration of this rule of public law. The people of the territory now composing the state of Vermont, separated from New York and erected that territory into a separate and independent state. Individual citizens whose property would be sacrificed by the event, claimed compensation of New York. The claim was rejected on the ground that the independence of Vermont was an act of force beyond the power of New York to control, and equivalent to a conquest of that territory. (*Wheaton, Elem. Int. Law*, pt. 4, ch. 4, § 2; *Kent, Com. on Am. Law*, vol. 1, pp. 178, 179; *Grotius, de Jur. Bel. ac Pac.*, lib. 3, cap. 20, § 7; *Vattel, Droit des Gens*, liv. 1, ch. 20, § 244; liv. 4, ch. 2, § 12.)

§ 7. "The principal party," says Vattel, "in whose name the war was made, cannot justly make peace, without including his allies." The same author remarks, that states which

have been associated in a war, or have directly taken part in it, are respectively to make their treaty of peace each for itself; but that the alliance obliges them to treat in concert. Such was the practice at Nimeguen, Reischwick, and Utrecht; at Vienna, in 1814, and at Paris, in 1856, the allies and associates in the wars concluded by these conventions, signed together, treaties of peace. As associates in a war ally themselves together for the purpose of carrying on the war, it is right and proper that they should act in concert in making a treaty of peace. But as each engages in the war for himself and on his own responsibility, each should be allowed to make his own treaty of peace. To determine in what cases an associate in the war may detach himself from the alliance, and make his own separate and particular peace, is a question of difficult solution. It has been alluded to in a preceding chapter, and is particularly discussed by Vattel. Associations and alliances in war, as already stated, oblige the parties, as a general rule, to treat in concert. But if any one should insist upon prosecuting the war beyond the object of the association, the others may very properly make peace for themselves. And any one may make a separate peace for himself, if, by so doing, he does not violate his obligations, expressed or implied, toward his associates. His right to separate himself from his allies depends entirely upon the nature and object of the alliance, and the obligations he has incurred by joining others in the war against a common enemy. (*Vattel, Droit des Gens*, liv. 2, chs. 12 and 15; liv. 3, ch. 6; liv. 4, ch. 2, § 16; *Kent, Com. on Am. Law*, vol. 1, p. 169; *Wildman, Int. Law*, vol. 1, p. 168; *Puffendorff, de Jur. Nat. et Gent.*, liv. 8, cap. 9, § 5.)

§ 8. Every treaty of peace, according to Vattel, is nothing more than a compromise. Were strict and rigid justice to be insisted on, it would be impossible ever to make a treaty of peace. Not only the character of the original cause of the war would have to be determined, in order to settle the question as to which of the belligerents was in the wrong, but also all of the operations of the war itself, and the expenses incurred and damages suffered by each party. This would be impossible; no other expedient, therefore, remains but to compromise all the claims and grievances on

gerent subjects in a neutral country. In all these cases the remedy may be asserted subsequently to the peace. Although private rights existing before the war may not be remitted by a treaty of peace, the presumption is otherwise as to the rights of kings and nations. (*Grotius, de Jur. Bel. ac Pac.*, lib. 3, cap. 20, § 19; *Wheaton, Elem. Int. Law*, pt. 4, ch. 4, § 3; *Vattel, Droit des Gens*, liv. 4, ch. 2, §§ 19-21; *The Eliza Ann*, 1 Dod. Rep., p. 249; *The Molly*, 1 Dod. Rep., p. 396; *Kent, Com. on Am. Law*, vol. 1, p. 168; *Wildman, Int. Law*, vol. 1, p. 142; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 13; *Bello, Derecho Internacional*, pt. 2, cap. 9, § 6; *Heffler, Droit International*, § 180; *Kluber, Droit des Gens Mod.*, § 325; *Pando, Derecho Pub. Int.*, p. 582.)

§ 10. But while a treaty of peace extinguishes the original subject of the war, it does not prevent new complaints from the same contested right. The grievances which originally kindled the war are settled, but new grievances arising from the same right or claim, may form a new cause of war, equally just with the former. The remarks of Wheaton and Kent on this point are clear and positive, and their language is almost identical with that of Vattel. "The peace," says Wheaton, "relates to the war which it terminates; and is perpetual, in the sense that the war cannot be revived for the same cause. This will not, however, preclude the right to claim and resist, if the grievances which originally kindled the war be repeated,—for that would furnish a new injury, and a new cause of war, equally just with the former. If an abstract right be in question between the parties, on which the treaty of peace is silent, it follows that all previous complaints and injury, arising under such claim, are thrown into oblivion by the *amnesty*, necessarily implied, if not expressed; but the claim itself is not thereby settled either one way or the other. In the absence of express renunciation or recognition, it remains open for future discussion." "Peace," says Kent, "leaves the contracting parties without any right of committing hostility, for the very cause which kindled the war, or for what has passed in the course of it. It is, therefore, no longer permitted to take up arms for the same cause. But this will not preclude the right to complain and resist, if the same grievances which kindled the war be renewed



and repeated, for that would furnish a new injury, and a new cause of war equally just with the former war. If an abstract right be in question between the parties, the right, for instance, to impress at sea one's own subjects, from the merchant vessels of the other, and the parties make peace without taking any notice of the question, it follows of course, that all past grievances, damages and injury, arising under such claim, are thrown into oblivion by the amnesty which every treaty implies, but the claim itself is not thereby settled, either one way or the other. It remains open for future discussion, because the treaty wanted an express concession or renunciation of the claim itself." (*Vattel, Droit des Gens*, liv. 4, ch. 2, §§ 19, 20; *Wheaton, Elem. Int. Law*, pt. 4, ch. 4, § 3; *Kent, Com. on Am. Law*, vol. 1, pp. 168, 169; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 2, cap. 13.)

§ 11. A treaty of peace does not extinguish claims unconnected with the cause of the war. Debts, existing prior to the war, and injuries committed prior to the war, but which made no part of the reasons for undertaking it, remain entire, and the remedies are revived. "The treaty of peace," says Wheaton, "does not extinguish claims founded upon debts contracted, or injuries inflicted previously to the war, and unconnected with its causes, unless there be an express stipulation to that effect. Nor does it affect private rights acquired antecedently to the war, or private injuries unconnected with the causes which produced the war. Hence, debts previously contracted between the respective subjects, though the remedy for their recovery is suspended during the war, are revived on the restoration of peace, unless actually confiscated in the mean time, in the rigorous exercise of the strict rights of war, contrary to the milder practice of recent times." (*Grotius, de Jur. Bel. ac Pac.*, lib. 3, cap. 20, §§ 16, 18; *Wheaton, Elem. Int. Law*, pt. 4, ch. 4, § 3; *Kent, Com. on Am. Law*, vol. 1, p. 169; *Wildman, Int. Law*, vol. 1, pp. 142, 143; *The Molly*, 1 Dod. Rep., p. 394.)

§ 12. A treaty of peace leaves every thing in the state in which it finds it, unless there be some express stipulations to the contrary. The existing state of possession is maintained, except so far as altered by the terms of the treaty. If

nothing be said about the conquered country or places, they remain with the possessor, and his title cannot afterwards be called in question. The intervention of peace covers all defects of title, and vests a lawful possession in the purchaser, in the same manner as it quiets the title of the hostile captor himself. This general rule is applied, without exception, to personal property or real, and is called the principle of *ut possidetis*. (*Kent, Com. on Am. Law*, vol. 1, p. 169; *Wheaton, Elem. Int. Law*, pt. 4, ch. 4, § 4; *Grotius, de Jur. Bel. ac Pac.*, lib. 3, cap. 6, §§ 4, 5; *Vattel, Droit des Gens*, liv. 3, ch. 13, §§ 197, 198; *Martens, Precis du Droit des Gens*, § 282; *Klüber, Droit des Gens Mod.*, §§ 254–259; *Mably, Droit de l'Europe*, tome 1, ch. 2, p. 144; *The Follina*, 1 *Dodson's Rep.*, p. 452; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 13; *Bello, Derecho Internacional*, pt. 2, cap. 9, § 6; *Heffler, Droit International*, § 181.)

§ 13. Treaties of peace are equally valid, whether made with the authorities which declared the war, or with a new ruling power or *de facto* government. Other nations have no right to interfere with the domestic affairs of any particular nation, or to judge of the title of the party in possession of the supreme authority. They are to look only to the fact of possession, and the power conferred upon such authorities, by the then existing plan of government, or fundamental law. Treaties of peace, made by the competent authorities of such governments, are obligatory upon the whole nation, and, consequently, upon all succeeding governments, whatever may be their character. “If the treaty requires the payment of money, to carry it into effect,” says Kent, “and the money cannot be raised but by an act of the legislature, the treaty is morally obligatory upon the legislature to pass the law, and to refuse it would be a breach of public faith. The department of the government that is intrusted by the constitution with the treaty-making power, is competent to bind the national faith in its discretion; for the power, to make treaties of peace, must be coextensive with all the exigencies of the nation, and necessarily involves in it that portion of the national sovereignty, which has the exclusive direction of diplomatic regulations and contracts with foreign powers. All treaties made by that power, become of absolute efficacy, because they are the supreme law of the land.” (*Kent, Com.*

on *Am. Law*, vol. 1, pp. 165, 166; *Vattel, Droit des Gens*, liv. 4, ch. 2, § 14; *Bello, Derecho Internacional*, pt. 2, cap. 9, § 6; *Heffler, Droit International*, § 84.)

§ 14. A treaty of peace binds the contracting parties from the moment of its conclusion, unless otherwise provided in the treaty itself. Hence, all hostilities are to cease from the time that the belligerent powers are restored to the normal relations of peace, and no rights of war can be subsequently acquired, or, (properly speaking,) exercised, by the parties to the treaty. It also follows, that if territory be ceded by such treaty, the ceding sovereignty can exercise no authority in the ceded territory, after the conclusion of the treaty, except for municipal purposes, and any grants of land, or of franchises to be enjoyed in the territory so ceded, are utterly null and void. But when is the treaty to be considered as concluded, (in the absence of any stipulation on this point,) at the time of its signature, or of its ratification? Upon this question, there is some difference of opinion, although the weight of authority is, that no public treaty begins to operate till it has passed through all the necessary forms and been ratified. It may have a retroactive effect, and relate back to the time of signing, if so provided in the treaty itself, but not otherwise; so, also, the time when it begins to operate may be postponed to a date subsequent to its ratification, but not unless it is so specially provided in the treaty. But the act of ratification may operate with retrospective effect, to confirm the treaty according to the terms of its provisions. (*Whepton, Elem. Int. Law*, pt. 4, ch. 4, § 5; *Kent, Com. on Am. Law*, vol. 1, p. 170; *Vattel, Droit des Gens*, lib. 3, §§ 24, 25; *Rayneval, Inst. du Droit de la Nat. et des Gens*, tome 2, p. 113; *Phillimore, On Int. Law*, vol. 3, § 517; *Wildman, Int. Law*, vol. 1, pp. 145, et seq.; *Grotius, de Jur. Bel.<sup>l</sup>ac Pac.*, liv. 3, chs. 20, 21; *Pando, Derecho Pub. Int.*, p. 583; *Hylton v. Brown*, 1 Wash. Rep., p. 312; *Baine, et al. v. Schooner Speedwell*, 2 Dallas Rep., p. 40; *The United States v. Reynes*, 9 Howard Rep., p. 127; *Davis v. The Police Jury, etc.*, 9 Howard Rep., p. 280; *The Elsebe*, 5 Rob. Rep., p. 189; *The Eliza Anne*, 1 Dod. Rep., p. 244; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 13; *Bello, Derecho Internacional*, pt. 2, cap. 9, § 6; *Heffler, Droit International*, § 183; *Pistoye et Duverdy, des Prises*, tit. 8, ch. 8.)

§ 15. Although a treaty of peace binds the governments of the contracting powers from the moment of its conclusion, (unless otherwise provided,) so that no belligerent right can afterward be lawfully exercised, it does not affect the citizens or subjects of such powers so as to render them *criminally* responsible, and liable to punishment for acts of hostility, till they have actual or constructive knowledge of the peace. The treaty is a law to the subjects of the contracting parties, by which their relations to each other are changed; and no one is punishable for the breach of a law till it is promulgated. A seizure *jure belli* made in time of peace is a wrongful act, and the injured party is entitled to restitution, and the government of the captor is bound to repair the wrong which was committed, through ignorance, by its subject; but the subject is not affected with *guilt* by reason of acts of hostility subsequent to the date of the treaty of which he had not been notified. In order to guard against inconveniences from the want of due knowledge of a treaty of peace it is usual to fix the periods at which hostilities are to cease at different places, and between different lines of latitude and longitude upon the high seas, and also to provide for the restitution of all property taken at such places after the peace went into operation, but by parties acting in ignorance of it. (*Kent, Com. on Am. Law*, vol. 1, p. 170; *Wheaton, Elem. Int. Law*, pt. 4, ch. 4, § 5; *Vattel, Droit des Gens*, liv. 2, ch. 12, §§ 156, 157; *Phillimore, On Int. Law*, vol. 3, §§ 518, 519; *Emerigon, Traité des Assurances*, ch. 12, sec. 22; *Wildman, Int. Law*, vol. 1, pp. 158, et seq.; *Hyllon v. Brown*, 1 Wash. Rep., pp. 342, 351; *Bello, Derecho International*, pt. 2, cap. 9, § 6; *Heffter, Droit International*, § 183; *Hautefeuille, Des Nations Neutres*, tit. 13; *Pistoye et Duverdy, Des Prises*, tit. 3, ch. 3; *De Cussy, Droit Maritime*, liv. 1, tit. 3, § 37.)

§ 16. But while all agree that individuals are not *criminally* responsible for acts of hostility committed after the date of the peace, so long as they are ignorant of it, there seems to be a difference of opinion among publicists whether they are responsible *civilliter* in such cases. Grotius says they are not liable to answer in damages, but it is the duty of the government to restore what has been captured and not

destroyed. "But the latter opinion seems to be," says Wheaton, "that wherever a capture takes place at sea, after the signature of the treaty of peace, mere ignorance of the fact will not protect the captor from civil responsibility in damages; and that if he acted in good faith, his own government must protect him and save him harmless. When a place or country is exempted from hostility by articles of peace, it is the duty of the state to give its subjects timely notice of the fact, and it is bound in justice to indemnify its officers and subjects who act in ignorance of the fact. In such a case it is the actual wrong-doer who is made responsible to the injured party, and not the superior commanding officer of the fleet, unless he be on the spot, and actually participating in the transaction. Nor will damages be decreed by the prize court, even against the actual wrong-doer, after a lapse of a great length of time." The case of the American ship *Mentor*, which was taken and destroyed off Delaware Bay, by British ships of war, in 1783, after the cessation of hostilities, but before the fact had come to the knowledge of either of the parties, has given rise to much discussion. The opinion of Sir Wm. Scott in that case, forms the substance of the foregoing remarks of Mr. Wheaton. This claim against Admiral Digby was decided in 1799. A claim had previously been made against the actual wrong-doer, and rejected by the English prize court. In discussing this case Chancellor Kent remarks: "It would seem from that case that the American owner was denied redress in the British admiralty, not only against the admiral of the fleet on that station, but against the immediate author of the injury. Sir William Scott denied the relief against the admiral, and ten years before that time, relief had equally been denied by his predecessor, against the person who did the injury. If that decision was erroneous, an appeal ought to have been presented. We have then the decision of the English high court of admiralty, denying any relief in such a case, and an opinion of Sir William Scott, many years afterwards, that the original wrong-doer was liable. The opinions cannot otherwise be reconciled, than upon the ground that prize courts have a large and equitable discretion, in allowing or withholding relief, according to the special circumstances of

the last nation was, and that there is no time in making out prizes due to the subject. *See Com. on Am. Law*, vol. 1, p. 172. *Wheaton, Elem. Int. Law*, pt. 4, ch. 4, § 5; *The John*, *Com. of Claims between U. S. and Great Britain*, p. 427; *Phillimore, On Int. Law*, vol. 8, §§ 520, 521; *Wildman, Int. Law*, vol. 1, pp. 146-159; *Bello, Derecho Internacional*, pt. 2, cap. 9, § 6; *De Cussy, Droit Maritime*, liv. 1, tit. 8, § 87.)

§ 17. When the treaty of peace contains an express stipulation that hostilities are to cease in a given place at a certain time, and a capture is made previous to the expiration of the period limited, but with a knowledge of the peace on the part of the captor, it has been a question among writers on prizes, and whether the captured property should be restored. "The better and the more reasonable opinion," says Kent, "that the capture would be null though made before the day limited, provided the captor was previously informed of the peace: for, as Emerigon observes, since operative knowledge of the peace, after the time limited in different parts of the world, renders the capture void, much more ought actual knowledge of the peace to produce that effect." Wheaton coincides in this view, but remarks that it may be questionable whether anything short of an official notification from his own government would be sufficient, in such a case, to affect the captor with the legal consequences of actual knowledge. This point was extensively discussed in the French prize courts, in the case of the capture of the British ship *Swineherd* by the French privateer *Bellona* in 1801, but the particular case was decided on the ground that the king's proclamation of peace was unaccompanied by any French attestation, and was not that sufficient and indubitable evidence to the French cruiser of the fact of peace, upon which he ought to have acted. (*Kent, Com. on Am. Law*, vol. 1, pp. 172, 173; *Wheaton, Elem. Int. Law*, pt. 4, ch. 4, § 5; *Valin, Traité des Prises*, ch. 4, §§ 4, 5; *Merlin, Répertoire, verb. Prises Maritimes*, § 5; *Emerigon, Traité d'Assurance*, ch. 12, § 19; *Abreu, Traité des Prises*, pt. 2, ch. 11; *The John*, *Com. of Claims between U. S. and Great Britain*, p. 427; *Phillimore, On Int. Law*, vol. 8, §§ 520, 521; *Wildman, Int. Law*, vol. 1, pp. 146-159; *Bello, Derecho Internacional*, pt. 2, cap. 9, § 6; *De Cussy, Droit Maritime*, liv. 1, tit. 8, § 87.)

be accompanied with that of all the rights which was annexed to a state taken. For this rule must not be extended to comprehend those things which may have been the subject of special treaties and others in the war itself and in its operations. The provisions of things restored or ceded by the treaty of peace are due from the time the restoration or cession of the things themselves takes effect it is true. But all provisions which were due or to be paid prior to the date of the peace treaty or cession are not to be delivered up. These provisions specially stipulated in the treaty for the time leading to the completion of the thing and the possession of things taken in war is assumed a lawful title subject however to the conditions of peace. "For the same reason," says Vattel, "the ceasing of a feud does not imply that if the produce anteriorly due. This Augustus justly maintained against Servius Pompeius who on having the Pedunculata given to him, claimed the imposts of the former years." (Vattel, *Levi des Gens*, liv. 4, ch. 3, §§ 30, 31; Appon, *De Bel. Civ.*, lib. 5; *Grœce de Jur. Bel. ac Pac.*, lib. 2, cap. 20, § 22; *Bello, Derecho Internacional*, pt. 2, cap. 9, § 6; *Wheaton, Elem. Int. Law*, pt. 4, ch. 4, § 6.)

§ 20. The same rule is laid down by Vattel, with respect to contributions levied upon the territory or inhabitants ceded or restored by the treaty of peace. "To raise contributions," he says, "is an act of hostility, which, on the conclusion of peace, is to cease. Those before promised, and not yet paid, are due, and may be required as a debt. But, in order to obviate all difficulty, it is proper that the contracting parties should clearly and minutely explain their intentions respecting matters of this nature; and they are generally careful to do so." But the correctness of the rule, as thus applied to territory restored by the treaty, may very well be doubted. There is a broad distinction between *military* and *civil* rights; the latter are acquired by contract, conveyance, or other *title*, and are evidenced by the ordinary proofs of *title*; while the latter are acquired by capture or conquest, and are evidenced by *possession* alone—they begin and end with possession. If the conquest is restored by the treaty of peace, the right of possession is terminated, and with it all the incidental rights of military occupation, such as the right of levying and col-

lecting military contributions. The principle of *uti possidetis* being the basis of every treaty of peace, unless otherwise specially provided in the treaty itself, it follows that the conqueror (the treaty being silent on this point,) is entitled to all the contributions which he has collected, by the right of military occupation, of the belligerent territory now surrendered; but not to those which he has levied but failed to collect. His rights over the inhabitants of such territory are *military* rights, and, consequently, terminate with the right of possession, *i. e.*, with the treaty of peace which restores the conquest. (*Vattel, Droit des Gens*, liv. 4, ch. 3, § 29; *Duponceau, Translation of Bynkershoek*, p. 116, note; *Wheaton, Elem. Int. Law*, pt. 4, ch. 4, § 4; *Vide Ante*, chapters xxxii and xxxiii; *Heffter, Droit International*, §§ 176, et seq.; *Bello, Derecho Internacional*, pt. 2, cap. 9, § 6.)

§ 21. We have already spoken of the general obligations of a treaty of peace, and have shown that when made by competent authority, it is binding upon the whole state. The question has been raised, how far the plea, that the treaty of peace was obtained through intimidation, or extorted by by force, may dispense with its observance. *Vattel* says, that such a plea will not invalidate a treaty, or dispense with its observance: "First, were this exception admitted, it would destroy, from the very foundations, all the security of treaties of peace; for there are few treaties of that kind which might not be made to afford such a pretext as a cloak for the faithless violation of them." But, according to the opinion of the same author, there may be exceptions to this rule, as in the case of a forced submission to conditions equally offensive to justice and to all the duties of humanity. If a rapacious and unjust conqueror subdues a nation and forces her to accept of hard, ignominious, and insupportable conditions, necessity obliges her to submit; but this apparent tranquility is not a peace; it is an oppression which she endures only so long as she wants the means of shaking it off, and against which men of spirit rise on the first favorable opportunity. When *Fernando Cortes* attacked the empire of Mexico, without any shadow of reason, without even a plausible pretext,—if the unfortunate *Montezuma* could have recovered his liberty by submitting to the iniquitous and cruel conditions of



receiving Spanish garrisons into his towns and his capital, of paying an immense tribute, and obeying the commands of the king of Spain,—will any man pretend to assert that he would not have been justifiable in seizing a convenient opportunity to recover his rights, to emancipate his people, and to expel or exterminate the Spanish horde of greedy, insolent, and cruel usurpers? No! such a monstrous absurdity can never be seriously maintained. Although the law of nature aims at protecting the safety and peace of nations, by enjoining the faithful observance of promises, it does not favor oppressors.” (*Vattel, Droit des Gens*, liv. 4, ch. 4, § 37; *Puffendorf, De Jure Nat. et Gent.*, lib. 8, cap. 8, § 1; *Heffler, Droit International*, §§ 85, 98, 99; *Burlamaqui, Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 14; *Wildman, Int Law*, vol. 1, p. 140.)

§ 22. A treaty of peace may revive former treaties by express stipulation, or, in certain cases, without any stipulation whatever. As a general rule, the obligations of treaties are dissipated by war, and they are regarded as extinguished and gone forever, unless expressly revived by the treaty of peace. But this rule is by no means universal. “Where treaties contemplate a permanent arrangement of national rights,” says Kent, “or which, by their terms, are meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war. They revive at peace, unless waived, or new and repugnant stipulations be made.” (*Kent, Com. on Am. Law*, vol. 1, p. 177; *Vattel, Droit des Gens*, liv. 3, ch. 10, § 174; *Grotius, de Jur. Bel. ac Pac.*, lib. 3, cap. 25; *Heineccius, Elem. Jur. Nat. et Gent.*, lib. 2, cap. 9; *Sutton v. Sutton*, 1 Russell and Milne Rep., p. 663; *The S. for P., the Gospel v. New Haven*, 8 Wheaton Rep., p. 494; *Phillimore, On Int. Law*, vol. 3, §§ 531, et seq., *Wheaton, Elem. Int. Law*, pt. 3, ch. 2, §§ 9–11; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 13.)

§ 23. “The breach of a treaty of peace,” says Vattel, “consists in violating the engagements annexed to it, either by doing what it prohibits, or by not doing what it prescribes. Now, the engagements contracted by treaty may be violated in three different ways,—by a conduct that is repugnant to the nature and essence of every treaty of peace in gene-

ral,—by proceedings which are incompatible with the particular nature of the treaty in question,—or, finally, by the violation of any article expressly contained in it.” These different modes by which a treaty of peace may be violated, are discussed by Vattel at considerable length. We shall allude here only to the last, that is, how far the breach of a single article is a breach of the whole treaty. The violation of any one article of a treaty of peace, abrogates the whole treaty, if the injured party so elects to consider it; for all the articles are dependent on each other, and one is to be deemed a condition of the other. It is sometimes, however, expressly stipulated that if one article be broken, the others shall nevertheless be continued in force. But, without such stipulation, the injured party may regard the violation of a single article as overthrowing the whole treaty. “We have a strong instance in our own history,” says Kent, “of the annihilation of treaties by the act of the injured party. In 1798, the congress of the United States declared that the treaties with France were no longer obligatory on the United States, as they had been repeatedly violated on the part of the French government, and all just claims for reparation refused.” Publicists very properly distinguish between a void and a voidable treaty. If the treaty be violated by one of the contending parties, either by proceedings incompatible with its general spirit, or by a specific breach of any one of its articles, it becomes not absolutely void, but voidable at the election of the injured party. If he prefers not to come to a rupture, the treaty remains valid and obligatory. He may waive or remit the infraction committed, or he may demand a just satisfaction. (*Wheaton, Elem. Int. Law*, pt. 4, ch. 4, § 7; *Kent, Com. on Am. Law*, vol. 1, pp. 175, 176; *Grotius, de Jur. Bel. ac Pac.*, lib. 2, cap. 15, § 15; *Vattel, Droit des Gens*, liv. 4, ch. 4, §§ 38, 48, 54; *Burlamaqui, Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 14; *Bello, Derecho Internacional*, pt. 2, cap. 9, § 6; *Heffter, Droit International*, § 184.)

§ 24. Affected delays in performing the conditions of a treaty of peace, are, says Vattel, equivalent to an express denial, and differ from it only by the artifice with which he, who practices them, seeks to palliate his want of faith; he adds fraud to perfidy, and actually violates the article which

he should fulfill. But, if a real impediment stands in the way, time must be allowed, for no one is bound to perform impossibilities. If the obstacle be utterly insurmountable, the other party should accept of an indemnification, if the case will admit of it, and the indemnification be practicable. But if no equivalent can be offered, the intervening impossibility undoubtedly cancels the particular obligation. (*Vattel, Droit des Gens*, liv. 4, ch. 4, §§ 50, 51; *Rayneval, Inst. du Droit Nat., etc.*, liv. 4, chs. 23-26; *Bello, Derecho Internacional*, pt. 2, cap. 9, § 6; *Heffter, Droit International*, § 184.)

§ 25. "There is," says Kent, "a very material and important distinction made by the writers on public law, between a new war for some new cause, and a breach of a treaty of peace. In the former case, the rights acquired by the treaty subsists, notwithstanding the new war; but in the latter case, they are annulled by the breach of the treaty of peace, on which they were founded. A new war may interrupt the exercise of the rights acquired by the former treaty, and, like other rights, they may be wrested from the party by the force of arms. But then they become newly acquired rights, and partake of the operation and result of the new war. To recommence a war by breach of the articles of a treaty of peace, is deemed much more odious than to provoke a war by some new demand and aggression; for the latter is simply injustice, but, in the former case, the party is guilty both of perfidy and injustice." (*Kent, Com. on Am. Law*, vol. 1, p. 175; *Grotius, de Jur. Bel. ac Pac.*, lib. 3, cap. 20, §§ 27, 28; *Vattel, Droit des Gens*, liv. 4, ch. 4, § 42; *The Schooner Sophie*, 6 Rob. Rep., p. 148; *Bello, Derecho Internacional*, pt. 2, cap. 9, § 6; *Real, Science du Gouvernement*, tome 5, ch. 3, sec. 5; *Moser, J. J. Vermecht Abhandl.*, No. 1; *Heffter, Droit International*, § 184.)

## CHAPTER XXXV.

### RIGHTS OF POSTLIMINY AND RECAPTURE.

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§ 1. The *jus postliminii* was a fiction of the Roman law by which persons, and, in some cases, things, taken by an enemy were restored to their original legal *status* immediately on coming under the power of the nation to which they formerly belonged. "*Postliminium fingit eum qui captus est, in civite semper fuisse.*" With respect to persons, the right of postliminy had a double effect, passive and active. *Passive*, inasmuch as the returned son fell again under the power of

his parent, and the returned slave under the power of his master; and, *active*, inasmuch as the returned person claimed to exercise his original rights over other persons or things. To produce this passive effect, the only requisite was the simple *return* of the individual; but to produce the active effect, the individual must have returned *legally and for the purpose* of regaining his rights. The *jus postliminii* was denied to those who illegally returned to their country during an armistice, to deserters, to those who had surrendered in battle, to those who had been abandoned by their country, or who had been the subject of a *deditio*, either during the war, or at the time of making peace. With respect to things taken by the enemy, the Roman law considered them as withdrawn from the category of legal relations during the period of the enemy's possession of them. If retaken by their former owner, they become his by the recapture; but, if retaken by the state they were considered as booty, or prize of war, the original right of property being extinguished by the intervening hostile possession. But, certain things were excepted from this rule, as real property, horses, vessels used for purposes of war, etc.; and to these the *jus postliminii* was accorded. This general maxim of the Roman law, although not in all its details, is engrafted into modern international jurisprudence, and is fully recognized as an incident to the state of war, and contributes essentially to mitigate its calamities. (*Phillimore, On Int. Law*, vol. 3, § 403; *Justinian, Institutes*, lib. 1, tit. 12, § 5; *Vattel, Droit des Gens*, liv. 3, ch. 14, § 204; *Kent, Com. on Am. Law*, vol. 1, p. 108; *Wheaton, Elem. Int. Law*, pt. 4, ch. 2, § 15; *Klüber, Droit des Gens*, §§ 256, et seq.; *Martens, Precis du Droit des Gens*, § 483.)

§ 2. The right of postliminy is founded upon the duty of every state to protect the persons and property of its citizens against the operations of the enemy. When, therefore, a subject who has fallen into the hands of the enemy is rescued by the state or its agents, he is restored to his former rights and condition under his own state, for his relations to his own country are not changed either by the capture or the rescue. So, of the property of a subject recaptured from the enemy by the state or its agents; it is no more the property

of the state than it was before it fell into the hands of the enemy; it must, therefore, be restored to its former owner. But if, by the well established rules of public law, the title to the captured property has become vested in the first captor, the former owner cannot claim its restoration from the recaptor, because his original title has been extinguished. The *jus postliminii* of the Roman law applied almost exclusively to questions of private rights, but the principles of natural justice embodied in that law are applicable to states as well as to individuals, in their intercourse with each other. It has, therefore, been held in modern times to extend not only to individuals of the same state, but also to individuals of different states, and to the international relations of states themselves. (*Phillimore, On Int. Law*, vol. 3, §§ 539, 540; *Vattel, Droit des Gens*, liv. 3, ch. 14, § 206; *Martens, Précis du Droit des Gens*, § 283; *Heffter, Droit International*, §§ 187, et seq.; *Voet, ad Pandect*, tit. 4, p. 642; *Pfeiffer, Das Recht der Kriegseroberung*, pp. 40, et seq.; *Bello, Derecho Internacional*, pt. 2, cap. 4, § 8; *Klüber, Droit des Gens*, §§ 258, 259.)

§ 3. Postliminy is considered as taking effect the moment that the persons, or property taken on land by an enemy, come within their sovereign's territory, or within places under his command, or into the hands of his officers or agents. But, in cases of prize and maritime recapture the question of restoration usually involves that of military salvage which must be determined by a court of competent jurisdiction. Vessels and goods taken by the enemy as prizes, and recaptured by the principal belligerent, or his allies, must, therefore, be brought *infra praesidia*, and adjudicated precisely the same as in case of a prize. (*Vattel, Droit des Gens*, liv. 3, ch. 14, § 206; *Kent, Com. on Am. Law*, vol. 1, p. 108; *Wheaton, Elem. Int. Law*, pt. 4, ch. 2, § 17; *Bynkershoek, Quaest. Jur. Pub.*, lib. 1, cap. 5; *Bello, Derecho Internacional*, pt. 2, cap. 4, § 8; *Heffter, Droit International*, § 188; *Pando, Derecho Pub. Int.*, p. 409.)

§ 4. The right of postliminy belongs exclusively to a state of war, and no longer exists after the conclusion of a treaty of peace. The intervention of peace cures all defects of title to property of every kind, acquired in war, and such title cannot be subsequently defeated in favor of the original

owner, not even in the hands of a neutral possessor, who himself becomes an enemy. Such property may be liable to capture as booty, or prize of war, the same as any other property of that neutral, now an enemy, but it is not affected by the right of postliminy. By the principle of *uti possidetis*, which, as already stated, applies to every treaty of peace, unless otherwise specially stipulated, all captured property is tacitly conceded to the possessor, and, if recaptured in a subsequent war, it is subject to the laws of capture, but not to those of postliminy. Nevertheless, there are many cases, where, the treaty of peace being silent, and the principle of *uti possidetis* not applicable, it is necessary to resort to the *jus postliminii* in order to determine the true condition of things *at the time* of the treaty; or the moment they were freed from the pressure of the captor's force, as an *enemy*; in other words, whether, when the captor ceases to be an enemy, the thing captured legally becomes his property, or returns to the former owner. Hence, the very intimate connection between treaties of peace and the rights of postliminy. (*Bello, Derecho Internacional*, pt. 2, cap. 4, § 8; *Manning, Law of Nations*, pp. 142, 143; *Phillimore, On Int. Law*, vol. 3, § 539; *Vattel, Droit des Gens*, liv. 3, ch. 14, § 216; *Kent, Com. on Am. Law*, vol. 1, p. 111; *Wheaton, Elem. Int. Law*, pt. 4, ch. 4, § 4; *The Parisian Concepcion*, 6 Rob. Rep., p. 45; *The Schooner Sophia*, 6 Rob. Rep., p. 138; *Heffler, Droit International*, § 188.)

§ 5. It is a general rule of international law, that allies in war make but one party with the principal; the cause being common, the rights and obligations are the same. It follows, therefore, that when persons and things belonging to one of the allies, which have been taken by the enemy, fall into the hands of another ally, they are subject to the right of postliminy, and must be restored to their former condition. The recapture by an ally, is regarded the same as a recapture by the principal, and *vice versa*. So, also, with respect to territory, persons and things brought within the territory of one ally, are affected by the rights of postliminy precisely the same as if brought within the territory of their own sovereign. But, if the ally does not become an associate in the war, or a co-belligerent, and merely furnishes the succors stipulated by treaty, without coming to a rupture with the enemy,

his dominions are regarded as neutral, and are governed by the laws of neutrality. (*Heffter, Droit International*, § 188; *Vattel, Droit des Gens*, liv. 3, ch. 14, §§ 207, 208; *Kent, Com. on Am. Law*, vol. 1, p. 109; *Bynkershoek, Quaest. Jur. Pub.*, lib. 1, cap. 5.)

§ 6. The right of postliminy, with respect to things, do not take effect in neutral countries, because the neutral is bound to consider every acquisition made by either party as a lawful acquisition, unless the capture itself is an infringement of his own neutral jurisdiction or rights. If one party were allowed in a neutral territory to enjoy the right of claiming goods taken by the other, it would be a departure from the duty of neutrality. Neutrals are bound to take notice of the military rights which possession gives, and which is the only evidence of right acquired by military force, as contradistinguished from civil rights and titles. The fact must be taken for the law. But with respect to persons, it takes effect, not only in the territory of the nation to which such persons belong, and in that of his allies, but also in a neutral country; so that if a belligerent brings his prisoners into a neutral territory he loses all control of them. So, if prisoners escape from their captors, and reach a neutral territory, they cannot be pursued and seized in such territory, and consequently, are restored to their former condition. Prisoners of war who have given their parole, may, or may not, claim the right of postliminy or reaching a neutral country, or coming again under the power of their own nation according to the terms of their parole. If left entirely free to return to their own country, subject to certain stipulated conditions, such as not to serve again for a certain period, or during the war, these conditions are not changed by recapture or rescue. But if they have only promised not to escape, or to remain within certain limits assigned to them, if they are rescued by their own party, or the place of their confinement falls into the hands of their own nation or its allies, they are released from their parole, and, by the right of postliminy, are restored to their former state. So if, by the incidents of the war, prisoners, not free to return to their own country, are brought into neutral territory, they are entitled to the benefit of that right. But it must be remembered, that priso-





be frequently applied to the case of mere private property, which, by the general rule of modern nations, is exempt from confiscation. There are some exceptions to this general rule, and wherever private real property has been confiscated by the enemy, and again comes into the possession of the nation to which the individual owner belongs, it is subject to the right of postliminy. The effect of complete conquest and retrocession will be considered in another paragraph. Gro-tius proposes the question with respect to the immovable property belonging to a prisoner of war, but situate in a neutral country. But Vattel summarily disposes of it with the just remark, that nothing belonging to a prisoner can be disposed of by the captor, unless he can seize it and bring it within his own possession. But the rule becomes of great practical importance when applied to questions arising out of alienations of real property belonging to the government, made by the opposite belligerent while in the military occupation of the country. We have already stated, that the purchaser of any portion of the national domain in the occupation of an enemy, previous to the confirmation or consummation of the conquest, takes it at the peril of being evicted by the original sovereign owner when he is restored to his dominions. But if the victor be so firmly established in possession, that opposition to his rule is overcome or virtually ceases, or if the conquest is accompanied by internal revolution and a recognition of the new government, in other words, if the conquest is legally complete, alienations of the public domain will not be annulled, even though the former sovereign should be restored. (*Vattel, Droit des Gens*, liv. 3, ch. 14, § 212; *Kent, Com. on Am. Law*, vol. 1, pp. 108, 109; *Wheaton, Elem. Int. Law*, pt. 4, ch. 2, § 17; *Meier, Political Ethics*, b. 2, § 86; *Phillimore, On Int. Law*, vol. 3, §§ 406, 539–574, 583; *Vide ante*, chapters xxxii. and xxxiii.)

§ 9. Towns, provinces, and territories, which are retaken from the conqueror during the war, or which are restored to their former sovereign by the treaty of peace, are entitled to the right of postliminy, and the original sovereign owner on recovering his dominion over them, whether by force of arms or by treaty, is bound to restore them to their former state. In other words, he acquires no new rights over them



they must bear the consequence of the transfer of their allegiance to a new sovereign; and, should they subsequently fall into the power of their former sovereign, he is, in turn, to be regarded as a conqueror, and they cannot claim, as against him, any rights of postliminy. The correctness of the principle of international law, as stated above, is never disputed; but there is great difficulty in determining when the conquest is complete, or in drawing the precise line between absolute conquest and mere military occupation. This distinction has been discussed in the preceding chapters. (*Heffter, Droit International*, § 188; *Chitty, Law of Nations*, pp. 95, 96; *Bynkershoek, Quaest. Jur. Pub.*, lib. 1, cap. 16; *Bello, Derecho International*, pt. 2, cap. 4, § 8; *Rayneval, Inst. du Droit Nat.*, liv. 3, ch. 18; *Vattel, Droit des Gens*, liv. 3, ch. 14, §§ 213, 214; *Leiber, Political Ethics*, b. 2, § 86; *Wheaton, Elem. Int. Law*, pt. 1, ch. 2, § 18; pt. 4, ch. 2, § 16; Vide ante chapters xxxii. and xxxiii.)

§ 10. A state is sometimes entirely subjugated and its personality extinguished by a compulsory incorporation into another sovereignty. As the towns, provinces and territories of which it was composed now become subordinate portions of another society, their relations to each other and to the new state result from the will of the new sovereign. If, by a subsequent revolution, the extinguished state resumes its independence, and again becomes a distinct and substantive body, its constituent parts may resume their former relations, or assume new positions and rights, according to the character of the society which is recognized, and the constitution or government which it adopts. This is a question of local public law, rather than of international jurisprudence. But if the subjugated state is delivered by the assistance of another, the question of postliminy may arise between the restored state and its deliverer. There are two cases to be considered: first, where the deliverance is effected by an ally, and second, where it is effected by a friendly power unallied. In either case, the state so delivered, is entitled to the right of postliminy. If the deliverance be effected by an ally, the duty of restoration is strict and precise, for an ally can claim no right of war against its co-ally. If the deliverance be effected by a state unallied but not hostile, the reestablish-



*limore, On Int. Law*, vol. 1, § 244; *Alison, Hist. of Europe*, vol. 4, pp. 370, 503; *Rotteck, Hist. of the World*, vol. 4, p. 248; *Annual Register, British*, 1814, p. 191; *Hansard, Parliamentary Debates*, vol. 30, pp. 894, et seq.)

§ 12. Having considered the law of postliminy applicable to the retaking of movable and immovable property captured on land, it remains to examine its application to the retaking of prizes, or property captured at sea,—what was called in latin, *recuperatio*, and is known in English law, as *recapture*. There is a manifest difficulty in applying the right of postliminy to maritime recaptures, on account of the uncertainty of the time when the title of the original proprietor is completely divested. If all nations had adopted the principle, that condemnation, by a competent court of prize, was necessary, in all cases, to effect a change of ownership, the rules of postliminy applicable to prizes, would be the same in all countries; but as this principle has not been universally adopted, there is not, in practice, any well established rule of maritime recapture. Different text-writers have advocated different principles, and different legislators have enacted different laws, and, as a consequence, the prize courts of different countries have adopted different rules of decision. (*Phillimore, On Int. Law*, vol. 3, § 407; *Whcaten, Elem. Int. Law*, pt. 4, ch. 2, § 12; *The Santa Cruz*, 1 Rob. Rep., pp. 58–63; *Bello, Derecho Internacional*, pt. 2, cap. 5, § 6; *Heffler, Droit International*, § 191; *Hautefeuille, Des Nations Neutres*, tit. 13, ch. 3; *Jouffroy, Droit Maritime*, p. 313; *Poehls, Seerecht, etc.*, b. 4, §§ 509, et seq.; *Kallenborn, Seerecht, etc.*, b. 3, p. 378; *Dalloz, Repertoire, verb. Prises Maritime*, sec. 3; *Pistoye et Duverdy, Des Prises*, tit. 7; *Manning, Law of Nations*, p. 141.)

§ 13. It is remarkable, says Phillimore, that of all the ancient codes of maritime law,—the Consolato del Mare, the Rôle des judgemens d'Oleon, the laws of Wilsby, the ancient Statutes of Hamburg, Lubeck, Bremen, and the Haus-Towns,—the Consolato del Mare alone deals with the case of recaptures. The doctrine of *perductio infra praesidia*, as constituting a sufficient conversion of property, is there expressed, but not in terms very intelligible in themselves. These terms, however, have been satisfactorily explained by Grotius and

Barbeyrac, and the whole subject has been most ably discussed by Bynkershoek. Nevertheless, it was left unsettled whether the right of postliminy should apply to all maritime recaptures, or only to ships; whether they must be taken *infra praesidia* of the captor, or whether the bringing *infra praesidia* of a neutral was sufficient to change the property; moreover, it was often a matter of dispute what should be understood by the phrase *infra praesidia*. This state of the question led to various treaty stipulations and municipal statutes, by which the subject of recapture was regulated with respect to the contracting parties and their own subjects; and with respect to countries with which the recaptor had no treaty in relation to the application of postliminy to such cases, the courts have sometimes adopted the rule of reciprocity. Sir William Scott considers this the most liberal and rational rule which can be applied. "To the recaptured," he says, "it presents his own consent, bound up in the legislative wisdom of his own country; to the recaptor, it cannot be considered as injurious, where the rule of the recaptured would condemn, whilst the rule of the recaptor prevailing among his own countrymen, would restore, it brings an obvious advantage; and even in case of immediate restitution, under the rules of the recaptured, the recapturing country would rest secure in the reliance of receiving reciprocal justice in its turn. It may be said, what if this reliance should be disappointed? Redress must then be sought from retaliation; which, in the disputes of independent states, is not to be considered as vindictive retaliation, but as the just and equal measure of civil retribution. This will be their ultimate security, and it is a security sufficient to warrant the trust. For the transactions of states cannot be balanced by minute arithmetic; something must, on all occasions, be hazarded on just and liberal presumption." (*Phillimore, On Int. Law*, vol. 3, § 409; *Wheaton, Elem. Int. Law*, pt. 4, ch. 2, § 12; *The Santa Cruz*, 1 Rob. Rep., pp. 58-63; *Goss, et al. v. Wickers*, 2 Bur. Rep., p. 693; *Bello, Derecho Internacional*, pt. 2, cap. 5, § 6; *Heffler, Droit International*, § 191; *Hautefeuille, Des Nations Neutres*, tit. 13, ch. 3; *Lisoye et Duverdy, Des Prises*, tit. 7; *Loccenius, De Jure Maritime*, lib. 2, cap. 4; *Dalloz, Repertoire, verb. Prises Maritimes*, sec. 3.)

§ 14. Every power is obliged to conform to the law of nations, relative to postliminy, where the interest of neutrals are concerned, unless otherwise regulated by treaty stipulations. But such conventions or treaty stipulations establish a factitious right, which relates only to the contracting parties, and cannot bind others. So, with respect to allies, two allies may enter into an agreement by which the rights of postliminy may be restricted or extended, as between themselves, but such agreement can in no way affect the rights of postliminy of the third co-ally, who is not a party to it. His rights and duties in that respect, are governed and regulated by the rules of postliminy, which are recognized and established by the law of nations. But, in many cases, as already remarked, there is no recognized and well established rule of international law, which can be applied. So of municipal laws, they may modify the right of postliminy in its application to cases arising between the subjects of the same belligerent state, but they cannot change it so as to prejudice the absolute rights of citizens of other states, whether allies or neutrals. In other words, municipal statutes cannot deprive the subject of an ally of the benefit of postliminy, in case of recapture, nor take from the subject of a neutral state what he holds by a title, which is regarded as valid by the law of nations. They may, however, give to both, certain benefits of postliminy, which they could not claim under the well established principles of the law of nations as absolute rights. Such has been the general character of the modifications of postliminy which have been made, or attempted, by municipal laws and regulations. (*Bello, Derecho Internacional*, pt. 2, cap. 4, § 8; cap. 5, § 6; *Kent, Com. on Am. Law*, vol. 1, p. 111; *Wheaton, Elem. Int. Law*, pt. 1, ch. 1, § 12; *Vattel, Droit des Gens*, liv. 3, ch. 14, § 222; *Heffter, Droit International*, § 191.)

§ 15. The British prize act, section nine, provides that, "Any ship, vessel, goods or merchandise belonging to any of her majesty's subjects captured by any of her majesty's enemies, and afterwards recaptured from the enemy by any of her majesty's ships or vessels of war, shall be adjudged by the decrees of the court of admiralty, to be restored to the owner or proprietor thereof, upon payment for, and in lieu of, sal-



vage of one-eighth part of the true value of the said ship, vessel, goods, or merchandize, respectively, and such salvage of one-eighth shall be divided and distributed in such manner and proportion as is hereinbefore directed in cases of prize; provided, nevertheless, that if any such ship or vessel captured and recaptured as aforesaid shall have been by her majesty's enemies *set forth* or used as a ship or vessel of war, it shall not be restored to the former owner or proprietor thereof, but shall be adjudged lawful prize for the benefit of the captors." It has been shown elsewhere, that, according to the practice of the British prize courts, property captured in war is not deemed to be changed so as to debar the owner or captor, till there has been a sentence of condemnation; and therefore, until that period, the title of the original owner is not divested, and he is entitled to restitution, in the hands of whomsoever he may find the property. But if such sentence of condemnation has passed, it is a sufficient title to a vendee, and would also have entitled a recaptor to condemnation of the property, if the statute did not step in, and, *as to British subjects*, revive the *jus postliminii* of the original owner, on payment of salvage. This principle of ownership would extend to allies and neutrals the benefit of postliminy till *after* condemnation, if the courts had not engrafted on it the rule of reciprocity already alluded to. The United States by the act of March 8d, 1800, have enacted—"That when any vessel other than a vessel of war or privateer, or when any goods which shall hereafter be taken as prize by any vessels, acting under authority of the government of the United States, shall appear to have before belonged to any person or persons, resident within or under the protection of the United States, or under authority, or pretence of authority, from any prince, government or state, against which the United States have authorized, or shall authorize, defence or reprisals, such vessel or goods not having been condemned as prize by competent authority before the recapture thereof, the same shall be restored to the former owner or owners, he or they paying for, and in lieu of, salvage, if retaken by a public vessel of the United States, one-eighth part, and if retaken by a private vessel of the United States, one-sixth part, of the true value of the

vessel or goods so to be restored, allowing and excepting all imports and public duties to which the same may be liable. And if the vessel so retaken shall appear to have been *set forth* and armed as a vessel of war, before such capture or afterwards, and before the retaking thereof as aforesaid, the former owner or owners, on the restoration thereof, shall be adjudged to pay for, and in lieu of salvage, one moiety of the true value of such vessel of war or privateer." The second section of this act extends the foregoing provisions to the recapture of property claimed by the United States, allowing a salvage of one-sixth in case of recapture by a private vessel, and one-twelfth if by a public vessel. Section third extends the provisions of the first section to the restoration of recaptured property claimed by alien friends, the amount of salvage to be paid being such proportion of the true value of the vessel or goods so to be restored, as by the law or usage of the prince, government or state, within whose territory such former owner or owners shall be so resident, shall be required, on the restoration of any vessel or goods of a citizen of the United States, under like circumstances of recapture, made by the authority of such foreign prince, government or state, and where no such law or usage shall be known, the same salvage shall be allowed as is provided by the first section of this act." But the act was not to apply to cases where the foreign government would not restore the vessels or goods of citizens of the United States under like circumstances. It is thus seen that the municipal laws of the United States relating to recaptures are essentially different from the British statutes on the same subject, and that they conform to the true principles of the *jus postliminii* as modified by the rule of reciprocity. (*Wheaton, Elem. Int. Law*, pt. 4, ch. 2, §12; *Kent, Com. on Am. Law*, vol. 1, pp. 111, 112; *Chitty, Law of Nations*, pp. 99, et seq.; *Chitty, Com. Law*, p. 435; *Phillimore, on Int. Law*, vol. 3, §§ 418, 419; *British Statutes*, 17 Vica. c. 18; 43 Geo. iii., c. 160; 45 Geo. iii., c. 72; *Goss, et al. v. Wilhers, et al.*, 2 Burr. Rep., p. 693; *U. S. Statutes at Large*, vol. 2, p. 16; *The Adelaide*, 9 Cranch. Rep., p. 244; *Marshal, On Insurance*, b. 1, ch. 12, § 8; *The Sedulous*, 1 Dod. Rep., p. 253; *Le Caux v. Eden*, Doug. Rep., pp. 613, 616; *The Flad Oyen*, 1 Rob. Rep., p. 135; *The Santa*

*Cruz*, 1 Rob. Rep., p. 50; *The Fanny and Elmira*, Edw. Rep., p. 117; *The Purisima Concepcion*, 6 Rob. Rep., p. 45; *The Victoria*, Edw. Rep., p. 97; *Hautefeuille, Des Nations Neutres*, tit. 3, ch. 3.)

§ 16. The same provisions are made in the British and American statutes, with respect to the *setting forth as a vessel of war*, prior to the capture. We know of no American decision as to what constitutes such *setting forth*, but the meaning of the term has been fully settled by adjudications in the British prize courts. It has been decided that a commission of war is sufficient, if there be guns on board; that where the vessel has been fitted out as a privateer, after capture, although when recaptured she was navigating as a merchant vessel, it is conclusive against her, and the title of the former owner is considered as forever extinguished. So, where she has been employed in the military service of the enemy, by authority of the government, although she be not regularly commissioned; and the order of the commander of a single ship, will be presumed to have been given by competent authority. But the mere fact of employment in the military service of the enemy, is not a sufficient *setting forth as a vessel of war*. Where a ship was originally armed for the slave trade, and, after capture, an additional number of men were put on board, but where there was no commission of war and no additional arming, it was held not to be a *setting forth as a vessel of war*, under the act. Lord Stowell observed, that the act was drawn with the intention of expressing the sense and meaning of international law, with respect to what constitutes a vessel of war. (*Wheaton, Elem. Int. Law*, pt. 4, ch. 2, § 12; *Phillimore, On Int. Law*, vol. 3, § 420; *Valin, Sur l'Ordonnance*, tome 2, p. 262; *Wildman, Int. Law*, vol. 2, pp. 279, et seq.; *The Horatio*, 6 Rob. Rep., p. 320; *The Ceylon*, 1 Dod. Rep., p. 165; *The Actif*, Edw. Rep., p. 185; *The Santa Brigada*, 3 Rob. Rep., p. 56; *The Georgiana*, 1 Dod. Rep., p. 397; *The Nostra Sonora de Rosario*, 3 Rob. Rep., p. 10; *The Progress*, Edw. Rep., pp. 210, 222.)

§ 17. Although the letter of the French ordinances, previous to the revolution, condemned, as good prize, French property recaptured after being twenty-four hours in possession of the enemy, whether the same be retaken by public or private

armed vessels; yet it was the constant practice to restore such property when recaptured by the king's ships. By the ordinance of June 15th, 1779, all French property recaptured after twenty-four hours possession by the enemy was condemned to the crown, the king in council regulating the amount of salvage to be allowed the recaptors according to circumstances. The Arrête du 2 Prairial An. XI., which was, in part, a reproduction of the ordinances of 1681, provided that if the recapture be made by a public ship of war (*bâtiment de l'état*,) it shall be restored to the original proprietors, on payment to the recapturing crew, of the thirtieth part of the value if the twenty-four hours have not elapsed, and of the tenth part if they have elapsed; all the expenses incident to the recapture to be borne by the recaptured vessel. If the recapture be made by a privateer before the twenty-four hours have elapsed, she is entitled to one-third of the value of the recaptured ship and cargo; and, if after the twenty-four hours possession, to the whole. The law applicable to the recapture of a French vessel is equally applicable to the recapture of the vessel of an ally. The laws of Spain with respect to recaptures, have generally agreed almost entirely with those of France. In 1801, she made a rule with respect to the property of friendly nations, that where the recaptured ship is not laden for the enemy's account, it is to be restored upon the payment of a salvage of one-eighth if recaptured by public ships, and one-sixth if by privateers; provided, that the nation to which such property belongs has adopted, or agrees to adopt, a similar conduct towards Spain. The rule with respect to recaptures of Spanish property was the same as the French rule with respect to recaptures of French privateers. On the 5th of February, 1814, Spain concluded a treaty with Great Britain with respect to recaptures, by which restoration is to be made on the payment of the specified salvage, without reference to the time the ship has remained in the captor's hands, or whether it has been brought into the port of the captor or been condemned. Portugal, in her ordinances of 1704 and 1796, adopted the French and Spanish law of recaptures. But in May, 1797, she revoked her former rule by which twenty-four hours possession by the enemy divested the pro-

perty of the former owner, and allowed restitution after that time, on salvage of one-eighth if recaptured by a public ship, and one-fifth if by a privateer. The ancient law of Denmark condemned after twenty-four hours possession by the enemy, and restored if the property had been a less time in the enemy's possession, upon the payment of a salvage of one-half the value of the property recaptured. But the ordinance of 1810 restored Danish, or allied property, without regard to the time it had been in the enemy's possession, on the payment of salvage of one-third the value. With respect to Sweden, the ordinance of Charles XI., enacted, "that in case a ship belonged to Swedish subjects, after having been taken by the enemy, should be retaken, the recaptor shall have two-thirds of its value, and a third shall be restored to the proprietor, without respect to the time during which it may have been in the enemy's hands." The ordinance of 1788, made the same provisions, only changing the rate of salvage to one-half of the value of the property recaptured. There were many and great variations in the laws promulgated, at different times, by the states-general of the United Provinces. The ordinance of 1659, without making any distinction between the times of recapture and the quality of the recaptors allows a salvage of only one-ninth of the vessel and cargo. But the ordinance of 1677, directs, with respect to privateers, that a salvage of one-fifth shall be allowed in case of recapture before the property had been forty-eight hours in the enemy's possession, of one-third if more than forty-eight and less than ninety-six hours, and one-half if beyond that time. It was understood that the ordinance of 1659 was continued in force with respect to recaptures made by ships of war. It is thus seen, that the states-general allowed restoration in all cases, the rates of salvage being different according to character of the recaptor and the length of time the captured property had remained in the possession of the enemy. It is thus shown that the municipal laws of different nations, with respect to the application of the right of postliminy to maritime recaptures, are very different; some still adhering in part to the rigorous rule of the ancients that twenty-four hours possession by the enemy completes the capture, and that a recapture after that length of time is a

good prize of war; while others have relaxed the rule with respect to recaptures by public vessels, but enforce it as to those made by privateers; while others, again, enforce it with respect to the property of their own citizens, but relax it with respect to foreign nations, on the ground of reciprocity. (*Phillimore, On Int. Law*, vol. 3, §§ 413, 418; *Wheaton, Elem. Int. Law*, pt. 4, ch. 2, § 12; *The Santa Cruz*, 1 Rob. Rep., pp. 58–63; *Hautefeuille, Des Nations Neutres*, tit. 13, ch. 3; *Emerigon, Traité des Assurances*, ch. 12, sec. 23; *Bello, Derecho Internacional*, pt. 2, cap. 5, §§ 6, 7; *Heffter, Droit International*, § 192; *Valin, Com. sur l'Ord.*, liv. 3, tit. 9, § 3; *Azuni, Droit Mer*, pt. 2, ch. 4, § 11; *Pistoye et Duverdy, Des Prises*, tit. 7; *Abreu y Bertodano, Coleccion, etc.*, pt. 2, p. 371; *Daloz, Repertoire, verb. Prises Maritimes*, sec. 3; *Manning, Law of Nations*, p. 141; *Martens, Essai sur Armateurs*, pp. 49, 200; *Bynkershoek, Quaest. Jur. Pub.*, lib. 1, cap. 5.)

§ 18. It appears from the foregoing synopsis of the laws of recapture, that there is no uniform or fixed rule as to the *quantum* of salvage allowed in cases of recapture of a foreign vessel or foreign goods, the rates being different in different countries, and, even in the same country, in different cases. In the United States, by the act of March 3d, 1800, the amount of salvage is regulated by the law and usage which the government to which the person claiming the vessel or goods belongs, applies, under like circumstances, to the vessels and goods of the United States; and where no such law or usage shall be known, the same salvage is allowed as in case of recapture of the property of our own citizens. In England, it is left, in a great measure, to the courts to determine what is fit and reasonable. In France, and other states on the continent, the rate of salvage varies with the length of time the property recaptured had been in the enemy's possession. A distinction is also made in the rate of salvage allowed to a privateer and to a government vessel, the allowance to the former being usually much larger than to the latter. It being the duty of every citizen to assist his fellow citizens in war, and to retake their property out of the enemy's possession, non-commissioned vessels are usually allowed the same amount of salvage on a recapture as commissioned vessels. (*Manning, Law of Nations*, p. 141; *Wheaton, Elem.*

*Int. Law*, pt. 4, ch. 2, § 12; *The Helen*, 3 Rob. Rep., p. 224; *Hautefeuille*, *Des Nations Neutres*, tit. 13, ch. 3; *Act of Congress*, March 3d, 1800, ch. 14, § 3; *The Urania*, 5 Rob. Rep., p. 148; *The Progress*, Edw. Rep., p. 215; *The Hope*, Hay. and Marriott Rep., p. 216; *The Two Friends*, 1 Rob. Rep., p. 271; *The Mary*, 5 Rob. Rep., p. 200; *Wildman*, *Int. Law*, vol. 2, pp. 277, 285; *Dunlop*, *Digest of Laws of U. S.*, pp. 271-273; *Talbot v. Seaman*, 1 Cranch. Rep., p. 1; *The Adeline*, 9 Cranch. Rep., pp. 244, 287.)

§ 19. Neutral property recaptured from the enemy, if not subject to condemnation by the rules of international law, is not subject to pay salvage to the recaptor. This rule is founded upon the supposition that justice would have been done if the vessel had been carried into the enemy's port, and that if injury had been sustained by the act of capture, it would have been redressed by the tribunal of the country to whose cognizance the case would have been regularly submitted. This is a presumption which is to be entertained in favor of every state which has not sullied its character by gross violations of the law of nations. Thus, a Spanish vessel, bound from Monte Video to London, was recaptured from a French privateer, after recapture from a British privateer. No edict was produced from the French code to show that the vessel would have been subject to condemnation in a prize court of France, and salvage was pronounced not to be due. But if it be shown that the recaptured vessel of the neutral would, in all probability, have been condemned if she had been carried into the enemy's ports and subjected to the decisions of the enemy's tribunals, a real benefit has been conferred upon the neutral by the recapture, and a reasonable salvage will be allowed. Thus, where a neutral vessel, retaken from a French captor, was bound to a neutral port without certificates of origin on board, salvage was allowed on the ground that she would have been condemned by a French prize court. So, where the recaptured vessel would have been liable to condemnation under the French decrees prohibiting neutral trade with Great Britain. (*Kent, Com. on Am. Law*, vol. 1, p. 112; *Wildman*, *Int. Law*, vol. 2, pp. 286, 287; *Phillimore*, *On Int. Law*, vol. 3, § 422; *Wheaton*, *Elem. Int. Law*, pt. 4, ch. 2, § 12; *Valin*, *Traité des Prises*,

ch. 6, sec. 1, §§ 11, 12; *Bello, Derecho Internacional*, pt. 2, cap. 5, §§ 6, 7; *Pistoye et Duverdy, Des Prises*, tit. 7, ch. 2.)

§ 20. The allotment of salvage, where the recaptured property is claimed by subjects of the same state, is properly regulated by municipal law; but where it is claimed by subjects of allies or alien friends, the allotment of military salvage is properly a question of international law; so, also, of civil salvage, where the *quantum meruit* is the only rule for apportioning the remuneration. But, as already remarked, there being no well-established rule of international law universally acknowledged, with respect to the legal *status* of captured property, between the time of pernocation, or twenty-four hours possession, and the condemnation by a competent court of prize, restitution, in case of recapture between these periods, is not regarded as a matter of strict right, but, in a measure, one of favor and relaxation; and the belligerent recaptor certainly is justifiable in annexing conditions to his liberality. But where the restitution is regarded as a positive obligation on the part of the recaptor, and as a right which may be demanded by the owner of the recaptured property, it seems unreasonable and contrary to the principles of postliminy, that any heavy salvage should be allowed. Where, however, a positive benefit has been conferred, it is proper that the recaptor should be rewarded for his risk and trouble. Moreover, this remuneration should be sufficient to serve us as an incentive to vessels of the belligerent to use their best endeavors to rescue from an enemy the property which he has captured from their own citizens and allies, as well as from alien friends. Such views seem to have influenced the drawing of the statutes of the United States, on the allotment and *quantum* of salvage in cases of recapture by American vessels. (*Chitty, Law of Nations*, pp. 105–107; *Kent, Com. on Am. Law*, vol. 1, p. 112; *The Two Friends*, 1 Rob. Rep., p. 271; *The Johann*, 1 Rob. Rep., p. 38; *U. S. Statutes at Large*, vol. 2, p. 16; *Brightly, Digest of Laws of U. S.*, p. 82; *Dunlop, Digest of Laws of U. S.*, pp. 271–273.)

§ 21. There is an obvious distinction between *military* and *civil* salvage, the former being allowed for rescuing vessels or



goods from an enemy, and the latter for assistance rendered to a vessel or its cargo derelict at sea. Thus, if a vessel be captured going in distress into an enemy's port, and is thereby saved, it is merely a case of civil and not of military salvage. The same salvors, however, may, in some cases, be entitled to both these kinds of salvage; thus, where, upon a recapture, the parties have entitled themselves to a *military* salvage under the prize law, the court may also award them, in addition, a *civil* salvage, if they have subsequently rendered extraordinary services in rescuing the vessel in distress from the perils of the sea. (*Wildman, Int. Law*, vol. 2, p. 292; *Wheaton, Elem. Int. Law*, pt. 4, ch. 2, § 12; *The Louisa*, 1 Dodson Rep., p. 317; *The Franklin*, 4 Rob. Rep., p. 147; *The Sir Francis*, 2 Hagg. Rep., p. 156; *The Sir Peter*, 2 Dod. Rep., p. 73; *The Beaver*, 3 Rob. Rep., p. 292.)

§ 22. The following special rules respecting military salvage, are collected by Mr. Wheaton, from the decisions of English and American courts of prize. If a convoying ship recaptures one of the convoy, which has been previously captured by the enemy, the recaptors are entitled to salvage; but a mere rescue of a ship engaged in the same common enterprize, gives no right to salvage. Military salvage will not be allowed in any case where the property has not been actually rescued from the enemy. It is not necessary that the enemy should have actual possession; it is sufficient if the property is completely under his dominion: nor is it necessary that the recaptors should have actual possession; it is sufficient if the prize be actually rescued from the grasp of the hostile captor. Where a hostile ship is captured, and afterward recaptured by the enemy, and again recaptured from the enemy, the original captors are entitled to restitution on paying salvage, but the last captors are entitled to the whole rights of prize, for by the first recapture, the right of the original captors is entirely divested. Where the original captors have abandoned their prize, and it is subsequently captured by other parties, the latter are solely entitled to the property. But if the abandonment be involuntary, and produced by the terror of superior force, and especially if produced by the act of the second captors, the rights of the original captors are completely revived. Where the

original captor abandons his prize, whether voluntarily or through terror, and it is then recaptured, it is restored on payment of salvage, for the original owner never had the *animus delinquendi*. "As to recaptors, although their right of salvage is extinguished by a subsequent hostile recapture, and regular sentence of condemnation, divesting the original owners of their property, yet if the vessel be restored upon such recapture, and resume her voyage, either in consequence of judicial acquittal, or a release by the sovereign power, the recaptors are reintegrated in their right of salvage. And recaptors and salvors have a legal interest in the property, which cannot be divested by other subjects, without an adjudication in a competent court; and it is not for the government's ships or officers, or for other persons, on the ground of superior authority, to dispossess them without cause. In all cases of salvage where the rate is not ascertained by positive law, it is in the discretion of the court, as well upon recaptures as in other cases. (*Wheaton, Elem. Int. Law*, pt. 4, ch. 2, § 12; *The Wight*, 6 Rob. Rep., p. 315; *The Bella*, 1 Edwards Rep., p. 66; *The Franklin*, 4 Rob. Rep., p. 147; *The Edward and Mary*, 3 Rob. Rep., p. 305; *The Pensamento Felix*, 1 Edw. Rep., p. 116; *The Astrea*, 1 Wheaton Rep., p. 125; *The Lord Nelson*, 1 Edw. Rep., p. 79; *The Diligentia*, 1 Dod. Rep., p. 404; *The Mary*, 2 Wheaton Rep., p. 123; *The John and Jane*, 4 Rob. Rep., p. 216; *The Gage*, 6 Rob. Rep., p. 273; *The Charlotte Caroline*, 1 Dod. Rep., p. 192; *The Blendenhall*, 1 Dod. Rep., p. 414; *The Appollo*, 3 Rob. Rep., p. 308; *Talbot v. Seaman*, 1 Cranch. Rep., p. 1; *The Barbara*, 3 Rob. Rep., p. 171; *The Helen*, 3 Rob. Rep., p. 224; *The Polly*, 4 Rob. Rep., p. 227, note; *The Mary Ford*, 3 Dallas Rep., p. 188; *The Adventurer*, 8 Cranch. Rep., p. 327; 1 Wheaton Rep., p. 128, note; *Hudson v. Guestier*, 4 Cranch. Rep., p. 293; 6 Cranch. Rep., p. 281; *The Louisa*, 1 Dod. Rep., p. 317; *The Sedulous*, 1 Dod. Rep., p. 253; *Bynkershoek, Quaest. Jur. Pub.*, lib. 1, cap. 5; *Phillimore, On Int. Law*, vol. 3, §§ 422-429; *Valin, Sur l'Ordonnance*, tome 2, pp. 257-259; *Valin, Traité des Prise*, ch. 6, § 1; *Pothier, De Propriété*, No. 99; *Azuni, Droit Maritime, etc.*, pt. 2, ch. 4, §§ 8, 9; *Emerigon, Traité des Assurances*, ch. 17, sec. 7; *Pistoye et Duverdy, Des Prises*, tit. 7; *Dalloz, Répertoire, verb. Prises Maritime*, sec. 8.)

§ 23. If the original capture was unlawful, the recaptor, says Emerigon, acquires no property in the recapture. Thus, the French bark *Victoire*, chased by an English privateer, took refuge under the castle of the island of Majorca, and was taken by the privateer while at anchor within pistol shot of the castle. Some days after, the bark was recaptured by another French vessel. The original capture was held to have been unlawful and void, for having been made in neutral territory, and, consequently, in violation of the law of nations. The recaptor, however, received a large salvage for the recapture, probably as a fair compensation for his trouble, time, danger and expense in the rescue. This principle is applied to the recapture of neutral property, that is, of property neutral to both of the belligerents. If the original capture was a violation of the law of nations, the recaptors from the possession of the enemy acquire no right of property whatsoever. This is the universally received doctrine of the law of nations. "A belligerent," says Story, "by recapturing neutral property, (neutral to all the belligerents,) has done no meritorious service, and is not entitled even to any salvage. Nay, the recaptors may be held responsible in damages for the act, unless there was a real danger of condemnation to the neutral by the original captors, from their lawless disregard of the law of nations; and, if there was such danger, then the recaptors are entitled to salvage only." (*De Cussy, Droit Maritime*, liv. 1, tit. 3, § 30; *Emerigon, Traité des Assurances*, ch. 12, sec. 23; *Valin, Com. sur l'Ordonnance*, art. 8, tit. des prises; *Story, Miscellaneous Writings*, pp. 580, et seq.; *Azuni, Maritime Law*, vol. 2, pp. 277-286; *Merlin, Répertoire, verb. Prise Maritime*, § 3, art. 4; *Miller v. The Resolution*, 2 Dallas Rep., p. 1; *Talbot v. Seaman*, 1 Cranch Rep., p. 1; *The War Ouskan*, 2 Rob. Rep., p. 299; *Bello, Derecho Internacional*, pt. 2, cap. 5, § 7; *Hautefeuille, Des Nations Neutres*, tit. 13, ch. 8; *Dalloz, Répertoire, verb. Prises Maritimes*, sec. 3; *Pistoye et Duverdy, Des Prises*, tit. 7.)

§ 24. Emerigon discusses at considerable length the effect of a recapture of the ransom bill and hostage. Is the recaptor entitled to retain the hostage, and to demand the price of the ransom? A privateer out of Guernsey which had ransomed a French bark coming from Bayonne, was

afterward taken, with the hostage and ransom bill on board, by the French corvette *Amaranthe*. The admiral declared the prize good, and decreed the ransom to the king, who, by his ordonnance, annulled the bill and discharged the owners of the bark from the payment of the ransom. Valin maintains that the ransom bill and hostage represent, each separately and *in solido*, the ransomed vessel; so that the recapture of the privateer with one or the other on board, suffices to deprive her of all claim and title under the ransom bill, and transfers her rights to a new owner. But, if the privateer has remitted the bill to her owner, and at the same time sent the hostage on shore, the owner will then be entitled to payment of the ransom money, although the privateer should be afterward taken. Emerigon quotes Olea to prove, that the ransom bill is neither the vessel ransomed nor the ransom itself—that, although *proof* of the obligation, it is not the obligation itself. With respect of the hostage, he cannot become a prisoner of war to his own countrymen. He, therefore, is of opinion that the ransom bill captured in this case is valueless, and that the hostage recovers his liberty. The rights of the enemy's privateer have vanished with his defeat; and that the French privateer has no claim beyond the actual booty he has made. But if the ransom bill was accompanied by a bill of exchange drawn by the captain of the ransomed vessel, and this bill has been negotiated in good faith to the order of a third party *for value received*, it is to be paid by the owners of the ransomed vessel, notwithstanding the liberation of the hostage found on board of the captured privateer. (*Emerigon, Traité des Assurances*, ch. 12, sec. 23; *Valin, Traité des Prises*, ch. 11, secs. 2, 3; *Merlin, Répertoire, verb. Prise Maritime*, § 3, art. 4; *Bello, Derecho Internacional*, pt. 2, cap. 5, § 9; *Dalloz, Répertoire, verb. Prises Maritimes*, sec. 3; *De Cussy, Droit Maritime*, liv. 3, tit. 3, §§ 29, 30.)

§ 25. The same author discusses the question of recapture of a vessel by her own crew. He says that, those who throw off the yoke of an enemy, simply reënter into all their rights, and recover their first condition. That, it being the duty of the captain and crew of a captured vessel to retake her, when possible, they cannot claim her by the right of reco-

very when so retaken. By throwing off the yoke of the captor, they have merely rendered themselves master of their own vessel, and reëntered upon their former rights, but have acquired no new rights of property in the recovered vessel or cargo. But, in a case decided in the British court of admiralty, large salvage was decreed for such recapture. The circumstances, however, were somewhat peculiar, and perhaps formed an exception to the general rule. The vessel was American, a portion of the crew were British seamen, working their passage home. They assisted in recapturing the vessel from the enemy, and were allowed salvage on the property brought into a British port, it being held that, under the circumstances, it was no part of their duty as seamen to attempt the recapture, and that they would not have been guilty of desertion if they had declined it. The act of recapture was, therefore, on their part, a voluntary act. (*Emerigon, Traité des Assurances*, ch. 12, sec. 25; *Vattel, Droit des Gens*, liv. 3, chs. 13 and 14, §§ 213, 228; *Bello, Derecho Internacional*, pt. 2, cap. 5, § 8; *Valin, Com. sur. l'Ord.*, art. 8; *Sirey, Recueil, etc.*, an. 12, pt. 2, p. 5; *Valin, Traité des Prises*, ch. 6, § 1, No. 18; *Dalloz, Repertoire, verb. Prises Maritimes*, sec. 3; *Wildman, International Law*, vol. 2, p. 293; *The Two Friends*, 1 Rob. Rep., p. 271; *De Cussy, Droit Maritime*, liv. 1, tit. 3, § 30.)

§ 26. Captures by pirates being unlawful, no title can properly rest either in the captors or their vendees, and, in case of recapture, the original owner is, on principle, entitled to complete restitution. But on account of the risk incurred and benefit conferred, courts have usually allowed a pretty large salvage to the recaptors, where not regulated by municipal law. Some states have left this matter of salvage for rescue from pirates discretionary with the courts, while others have regulated it by law or ordinance. The French law of 2 Prairial An. xi., allows to the recaptor, a salvage of one-third the value of the ship and cargo. The Spanish ordinance put the possession by a pirate upon the same footing as by a privateer, the title to property being changed by twenty-four hours possession, and, consequently, if recaptured after that period, no restitution could be claimed, but if before, restitution on payment of a salvage of one-third the

value. Such was also the former usage of Holland and Venice, which was justified on the ground of public utility, as an inducement to attack pirates. The salvage for recapture from pirates in Great Britain, is also one-third the value of the captured property. With respect to restitution and salvage in case of the recapture from pirates of the property of alien friends, the rule of reciprocity is usually followed. Hautefeuille objects to the allowance of salvage in such cases, or at least to so large a salvage as one-third of the value, and refers with approbation to the treaty of 1783, between the United States and Sweden, by which it was agreed that property retaken from pirates, by a ship of war or privateer, should be restored entire to the true proprietor. (*Brown, Civil and Admiralty Law*, vol. 2, ch. 3, p. 461; *Loccenius, de Jur. Marit.*, lib. 2, cap. 2, No. 4; *Grotius, de Jur. Bel. ac Pac.*, lib. 3, cap. 9, § 17; *Wheaton, Elem. Int. Law*, pt. 4, ch. 2, § 12; *Phillimore, On Int. Law*, vol. 3, §§ 411, 412; *The Calypso*, 2 Hagg. Rep., p. 213; *Valin, Com. sur l'Ordonnance*, liv. 3, tit. 9, § 10; *Pothier, Traité de Propriété*, No. 101; *Hautefeuille, Des Nations Nuetres*, tit. 13, ch. 3; *Dalloz, Repertoire, verb. Prises Maritimes*, sec. 3; *De Cussy, Droit Maritime*, lib. 1, tit. 3, § 30.)

§ 27. The rules of joint capture, given in a preceding chapter, are equally applicable to joint recapture. It is held in England, that although the prize act only mentions recaptures by ships and boats, it does not intend to exclude those made by the assistance of land forces. Where an island was taken by a joint naval and military force, the ships recaptured were held liable to be adjudged under this act, and to be condemned to the captors, or to be restored on payment of salvage, as the case might be. Moreover, a land force may be entitled to sustain a claim of salvage for recapture of vessels in a maritime port, without the coöperation of a naval force, where the recapture is a necessary and immediate result of a military operation directed to the capture of the place within whose port the property is lying. Thus, where the delivery of captured English vessels resulted from the reöccupation of Oporto by the allied army under the Duke of Wellington, which was effected by military operations and a battle fought in the neighborhood for that object, the army

the vessel is entitled to salvage. It was also held that the claim of salvage was not limited upon property landed and transported to the shore where it remained to be returned to the owners in the possession of the prince, and was assumed and retained in whole as parts of the cargoes of the vessels so recaptured. *Thompson, Int. Law*, vol. 2, p. 287; *The Cybele*, 1 Edw. Rep. 39, 40, 41; *The Phoenix*, 1 Edw. Rep. 39, 40; *The Tanager*, 1 Edw. Rep. 39, 40; *The Spenser*, 1 Edw. Rep. 39, 40, 41; *The Dorsey*, 1 Edw. Rep. 39, 40.

§ 20. But a distinction is made where vessels of the same country are recaptured in native ports by a native army alone, or with the cooperation of allied forces. Thus in the case of *Cyprus*, it was held that although salvage was due for the recapture of English vessels in that port, none could be allowed for the Portuguese vessels recaptured at the same time. By the reconquest of the port by the forces of the state, the rights of the former sovereign were restored, and his subjects were entitled to receive their property back as it stood before the irruption of the enemy. The whole would revert instantly to the former owners, on the well established principle of preliminary. "The history of the world has produced no instance in which a claim of salvage for the rescue of a capital city, by the native army, has been made and allowed, and, therefore, on principle and practice, the claim is not sustainable. That is the state of the transaction in its simplest form. But, suppose allies be coöperating with the native army in the recapture, in that case the army coming as allies, and associated with the native army, compose part of the same body; they are pursuing the same objects, and stand in every respect on the same footing; they would have the same rights and no more, and the proportion of force can make no difference. The whole together must be considered as one army in every respect, where native property is concerned; and if the native army would not be entitled to salvage, the armies of the allies can claim none." (*Hefler, Droit International*, § 187, et seq.; *Wildman, Int. Law*, vol. 2, p. 288; *The Progress*, Edw. Rep., p. 219.)

## CHAPTER XXXVI.

### THE OBSERVANCE AND INTERPRETATION OF TREATIES.

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- § 1. Violation of the faith of treaties, how punished — § 2. Use of an oath or asseveration — § 3. Conditions to make a treaty binding — § 4. Attempts of the Popes to annul the obligation of treaties — § 5. Guarantees and securities — § 6. Duration of guarantees and withdrawal of pledges — § 7. Dissolution and termination of treaties — § 8. Effect of loss of sovereignty — § 9. Debts previously contracted — § 10. Remarks of Kent and Wheaton on the interpretation of treaties — § 11. Rules of Grotius — § 12. Of Vattel — § 13. Collision of stipulations — § 14. Rules of Rutherford — § 15. Of Paley — § 16. Minute rules of other writers — § 17. Objections to arbitrary formulæ — § 18. Importance of well-established principles.

§ 1. "As all nations," says Vattel, "are interested in maintaining the faith of treaties, and causing it to be everywhere regarded as sacred and inviolable, so likewise they are justifiable in forming a confederacy for the purpose of repressing him who disregards it." \* \* \* "Such a sovereign deserves to be treated as an enemy of the human race." The foregoing remarks of Vattel, with respect to nations combining together for the punishment of a state which violated its treaty stipulations, are not sustained by later authorities. A plain and indisputable violation of a treaty is, undoubtedly, a violation of the law of nations. While a treaty imposes on the one hand a perfect obligation, it produces



on the other a perfect right. To violate a treaty is, therefore, to violate a perfect right of him with whom it was contracted. Moreover, such violations are injurious to other states who are not parties to the treaty, for, in the words of Vattel, "we can no longer depend on the conventions to be made, if those that are made are not maintained." Nevertheless, they cannot be classed with piracy, or violence to the person of an ambassador. One who openly violates the obligations of a treaty, will incur the disgrace of infamy and the reproach of mankind, but, so far as penal consequences are concerned, it is only the injured party who is justified in resorting to open and solemn war for the purpose of inflicting punishment. (*Vattel, Droit des Gens*, liv. 2, ch. 15, §§ 221, 222; *Wheaton, Elem. Int. Law*, pt. 4, ch. 4, § 8; *Phillimore, On Int. Law*, vol. 2, § 44; *Kent, Com. on Am. Law*, vol. 1, p. 181; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 15; *Heffter, Droit International*, § 104.)

§ 2. The use of an oath, in treaties, does not constitute a new obligation, nor does it strengthen the obligation already contracted. The most that could ever be said of it was, that it gave some additional solemnity to the act, and imposed a *personal* obligation upon the sovereign who took the oath, or gave commission to another to swear for him. It could neither give validity to an invalid treaty, nor a preëminence to one treaty above another. The custom, once generally received, of swearing to treaties, has now entirely passed away. "Even children," says Vattel, "know that an oath does not constitute the obligation to keep a promise or treaty; it only gives additional strength to that obligation, by calling God to bear witness. A man of sense, or a man of honor, does not think himself less bound by his word alone, by his faith once pledged, than if he had added the sanction of an oath." The most modern example of the use of the oath, was in the alliance between France and Switzerland, in 1777. Asseverations are sometimes used in engagements or treaties between sovereigns; such as, *we promise in the most sacred manner; with good faith; solemnly; irrevocably; and pledge our royal words, &c.* These are now regarded as mere forms of expression, showing that the parties entered into the engagement with reflection, deliberation, and a full knowledge of what they were

doing. The words added nothing to the obligation of the treaty. But the formal and deliberate manner in which treaties are now made and ratified, render such forms of expression entirely superfluous. Even a tacit engagement is as much binding, as one made in express terms. Thus, everything which is necessarily understood in a treaty, and without which its stipulations cannot be carried out, is equally obligatory with the stipulations themselves. (*Vattel, Droit des Gens*, liv. 2, ch. 15, §§ 225, 229; *Phillimore, On Int. Law*, vol. 2, § 54; *Wenck, Jus. Gentium*, pp. 305, 306; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 15; *Heffter, Droit International*, § 96.)

§ 3. Martens says, that in order to make a treaty obligatory, the following five things are necessarily supposed: 1st, That the parties have power to contract. In other words, that the person or authority making the treaty, or ratifying it, had full power for that purpose. 2d, That they have consented. The form of such consent is entirely unimportant, provided it is fully and clearly declared. 3d, That they have consented freely. The consent must have been a voluntary act of the contracting party. The plea of *fear*, however, cannot be opposed to the validity of treaties between nation and nation, except, at most, in cases where the injustice of the violence employed is so manifest as not to leave the least doubt. 4th, That the consent is mutual. 5th, That the execution is possible. The last two requisites are too plain to require explanation or comment. (*Martens, Precis du Droit des Gens*, § 48; *Vattel, Droit des Gens*, liv. 2, ch. 12, §§ 157, et seq.; *Phillimore, On Int. Law*, vol. 2, § 45; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 15; *Real, Science du Gouvernement*, tome 5, ch. 3, sec. 7.)

§ 4. The popes at one time claimed the authority to absolve sovereigns from their engagements and to annul the obligations of treaties, under whatsoever solemnities they might be contracted. Vattel mentions a number of instances where, he says, they have undertaken to break the treaties of sovereigns, "to unloose a contracting power from his engagements, and to absolve him from the oaths by which he had confirmed them." \* \* \* "Who does not see

that these daring acts of the popes, which were formerly very frequent, were violations of the law of nations, and directly tended to destroy all the bands that could unite mankind, and to sap the foundations of their tranquility, and to render the pope sole arbiter of their affairs." (*Phillimore, On Int. Law*, vol. 2, § 54; *Vattel, Droit des Gens.*, liv. 2, ch. 15, § 223; *Salignac, Hist. of Poland*, vol. 4, p. 112; *De Thou, Hist. de sui Temporis*, lib. 17; *Bougeau, Hist. de T. de Westphalie*, vol. 6, p. 413; *Choisy, Hist. de Chas. V.*, p. 282; *Heffter, Droit International*, § 94.)

§ 5. "Unhappy experience," says Vattel, "having shown that the faith of treaties, sacred and inviolable as it ought to be, does not always afford a sufficient assurance that they shall be punctually observed,—mankind have sought for securities against perfidy,—for methods, whose efficacy should not depend on the good faith of the contracting parties. A *guarantee* is one of those means. When those, who make a treaty of peace, or any other treaty, are not perfectly easy with respect to its observance, they require the guarantee of some powerful sovereign. The party who *guarantees* promises to maintain the conditions of the treaty and to cause it to be observed." The guarantee may be to all the contracting parties equally, or only to one of them. It is an agreement to cause the fulfillment of the conditions of the treaty, but it in no way affects the conditions themselves; the party guaranteeing, therefore, has no right to interfere between the contracting parties, and decide upon the interpretation which should be given to its stipulations. But if called upon by one of these parties for assistance to enforce the treaty against the other, he must judge for himself whether such assistance is justly due as against the party complained of. We have pointed out, in another chapter, the distinction between guarantee and surety, where the engagements relate to things to be done by the party for whom the obligation is contracted. Sometimes one of the contracting parties puts some of its property or possessions into the hands of another, for the security of its promises, debts, or engagements. Movable things thus remitted are called *pledges*, towns and provinces are given in *pawn* or *mortgaged*, and if the revenues are ceded as

an equivalent for the interest of the debt, it is the fact called *antichresis*. But these securities have no effect upon the obligations of the treaty. The party giving the security is no more excusable for refusing or neglecting to perform his engagements than if no securities whatever had been given. (*Vattel, Droit des Gens*, liv. 2, ch. 16, §§ 235, 241; *Phillimore, On Int. Law*, vol. 2, §§ 55, et seq.; *Gunther, Europ. Volkerrecht*, b. 2, p. 154; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 15; *Klüber, Droit des Gens Mod.*, § 156; *Heffter, Droit International*, §§ 96, 97; *Real, Science du Gouvernement*, tome 5, ch. 3, sec. 8; *Heineccius, Elem. Juris.*, p. 209.)

§ 6. Questions have sometimes arisen with respect to the duration of the guarantee, and the withdrawal or release of the security. The guarantee naturally subsists until the stipulations guaranteed are performed, unless a certain time has been agreed upon for its termination. A general and indefinite treaty of guarantee may be changed or modified the same as any other treaty. As soon as the debt is paid, or the particular engagement is accomplished for which the security was given, the security ends, and the pledge should be returned, or the towns or provinces, held in pawn or under mortgage, should be restored in the same condition in which they were received, so far as depends upon the holder. But this is not always done by those who thus hold the possession; "the temptation," says Vattel, "is delicious; they have recourse to a thousand quibbles,—a thousand pretenses, to retain an important place, or a country under their obedience. The subject is too odious for us to allege examples; they are well enough known, and sufficiently numerous, to convince every sensible nation that it is very imprudent to make over such securities. But if the debt be not paid at the appointed time, or if the treaty be not fulfilled, what has been given in security may be retained and appropriated, or the mortgage seized, at least until the debt be discharged, or a just compensation made. The house of Savoy had mortgaged the country of Vaud to the cantons of Berne and Fribourg; and these two cantons, finding that no payments were made, had recourse to arms, and took possession of the country. The duke of Savoy, instead of immediately satisfying their just demands, opposed force to force, and gave them still

further grounds of complaint; wherefore, the cantons, finally successful in the contest, have since retained possession of that fine country, as well for the payment of the debt as to defray the expenses of the war, and to obtain a just indemnification." (*Vattel, Droit des Gens*, liv. 2, ch. 16, §§ 243, 244; *Gunther, Europ. Völkerrecht*, b. 2, p. 154; *Klüber, Droit des Gens Mod.*, § 156; *Garden, De Diplomatie*, liv. 4, sec. 1, § 1; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 15; *Heffter, Droit International*, §§ 96, 97; *Real, Science du Gouvernement*, tome 5, ch. 3, sec. 8.)

§ 7. Treaties may be dissolved, or their stipulations may terminate in various ways. Some expire by their own limitation, while others are terminated by war between the contracting parties; some are permanent in their nature, and although their operation may be suspended during war, they revive on the return of peace, unless expressly abrogated or altered by a new compact; while others again have reference to both peace and war, or exclusively to a state of war, and consequently continue in force, notwithstanding an entire interruption of pacific relations between the contracting parties. Thus, treaties made for a fixed period of time, or for a specified object, expire on the termination of the time designated, or the accomplishment of the object specified. Treaties of alliance, of succor and subsidy, of commerce and navigation—in fine, all stipulations having reference exclusively to pacific relations, cannot be construed to subsist after such relations have become hostile. Nor is a positive declaration of war necessary to produce this result. In our difficulties with France, in 1798–9, no public war was declared, but the two states were regarded as in hostile relation to each other, and subsisting treaties were held to be dissolved. Stipulations, which relate to boundaries, to the tenure of property, to public debts, etc., and which are permanent in their nature, are suspended by war, but revive as soon as hostilities cease. The treaties of 1783 and 1794, between the United States and Great Britain, respecting confiscations and alienage, were of a permanent character, and the supreme court held that they were not abrogated by the war of 1812, although their enforcement was, for the time being, suspended. Stipulations relating to prizes, priso-

ners of war, blockades, contraband, etc., are unaffected by a declaration of war between the contracting parties, and can only be annulled by new treaties, or in the manner provided in the instruments themselves. (*Vattel, Droit des Gens.*, liv. 2, ch. 12, §§ 188–197; *Wheaton, Elem. Int. Law*, pt. 8, ch. 2, §§ 9, 10; *Kent, Com. on Am. Law*, vol. 1, p. 177; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 15; *Heffler, Droit International*, §§ 98, 99; *Wildman, Int. Law*, vol. 1, p. 176; *Martens, Precis, du Droit des Gens.*, § 58; *Garden, De Diplomatie*, liv. 4, sec. 1, § 1; *Benton, Thirty Years, etc.*, vol. 1, p. 487; *Bas v. Tingy*, 4 Dallas Rep., p. 37; *Webster's Works*, vol. 4, p. 162.)

§ 8. But the obligations of treaties, even where some of their stipulations are, in their terms, perpetual, expire in case either of the contracting parties loses its existence as an independent state, or in case its internal constitution is so changed as to render the treaty inapplicable to the new condition of things. With respect to alliances, *Vattel* remarks, that “when a people are forced to receive laws, they may legally renounce their preceding treaties, if he, with whom they are constrained to enter into an alliance, requires it from them. As they then lose a part of their sovereignty, their ancient treaties fall with the powers that had concluded them. This is a necessity that cannot be imputed to them, and since they had a right to submit themselves absolutely, and to renounce all sovereignty, if it became necessary for their preservation; by a much stronger reason they have a right, under the same necessity, to abandon their allies. But a generous people will try every resource before they will submit to so severe and humiliating a law.” (*Vattel, Droit des Gens*, liv. 2, ch. 12, § 176; *Wheaton, Elem. Int. Law*, pt. 8, ch. 2, § 10; *Wildman, Int. Law*, vol. 1, ch. 4.)

§ 9. A distinction must be made between obligations and debts already incurred, and those which would be incurred if the treaty had not been terminated before its time by such a change in the circumstances of one of the contracting parties as to render it inapplicable. A change of condition, as the partial loss of its sovereignty and independence,—will not, in general, release such a state from obligations already

incurred, although it may prevent any new ones from occurring out of the same instrument, the stipulations of which are no longer applicable or obligatory. (*Wheaton, Elem. Int. Law*, pt. 3, ch. 2, § 10; *Phillimore, On Int. Law*, vol. 1, § 137; *Suarez, de Legibus, etc.*, p. 109; *Bello, Derecho Internacional*, pt. 1, cap. 9, § 3; *Heffler, Droit International*, §§ 98, 99; *Kluber, Droit des Gens, Mod.*, § 165, note a.)

§ 10. "Treaties of every kind," says Kent, "are to receive a fair and liberal interpretation, according to the intention of the contracting parties, and to be kept with the most scrupulous good faith. Their meaning is to be ascertained by the same rules of construction and course of reasoning which we apply to the interpretation of private contracts." The same general rule is laid down by Wheaton, but he adds: "Such is the inevitable imperfection and ambiguity of all human language, that the mere words alone of any writing, literally expounded, will go a very little way toward explaining the meaning. Certain technical rules of interpretation have, therefore, been adopted by writers on ethics and public law, to explain the meaning of international compacts, in cases of doubt." These rules are most fully expounded by Grotius, Vattel, Rutherford and Paley. We will give a brief outline of the principles of interpretation, as laid down by these authors. (*Kent, Com. on Am. Law*, vol. 1, p. 174; *Wheaton, Elem. Int. Law*, pt. 3, ch. 2, § 17; *Phillimore, On Int. Law*, vol. 2, §§ 64, et seq.)

§ 11. Grotius has devoted an entire chapter to the interpretation of difficult and ambiguous terms. He sets out with the saying of Cicero, that, "When you promise, we must consider rather what you mean, than what you say." But as inward motives are not in themselves discernible, we can determine what they were only from the words used, and conjectures drawn from other parts of the treaty, and from the peculiar circumstances of the particular case. These, he says, must sometimes be considered together, and sometimes separately. Words are not to be strictly construed according to their etymology, but according to their common use, as, "Use is the judge, the law, and rule of th." Technical words, or terms of art, are to be con-

strued according to their meaning in such art. Conjectures are to be drawn from the subject matter, the effect of the terms used, and the circumstances under which the engagement was entered into. He divides things promised into three classes, *favorable*, *odious*, and *mixed*. Favorable promises are those which carry in them an equality and a common advantage; odious promises are those where the charge and burthen is all on one side; and mixed promises are those which partake of both characters, but in which the favorable predominates. In the first, he says, the words must be taken in their full propriety, as they are generally understood, and if ambiguous, they must be allowed their largest sense. In the second, the words are to be taken in a stricter sense, whether they have reference to subject matter, time, or circumstances. In the third kind of promises, the words are to be taken according to the character of the particular stipulation in which they occur, or of the particular matter or circumstance to which they refer. These distinctions are particularly commented on by Vattel. (*Grotius, de Jur. Bel. ac Pac.*, lib. 2, cap. 16; *Smith, Com. on Stat. and Com. Law*, ch. 12.)

§ 12. Vattel lays down several maxims for the interpretation of treaties, which may be briefly stated as follows: 1st, It is not allowable to interpret what has no need of interpretation, for when a treaty is conceived in clear and precise terms, and the sense is manifest, and leads to no absurdity, there can be no reason for refusing the sense which is naturally presented and manifest. To go elsewhere in reach of conjectures, is to endeavor to elude it. 2d, If he who could, and ought to have explained himself clearly, has not done so, he cannot be allowed to introduce subsequent restrictions for his own benefit. *Pactionem obscuram iis nocere, in quorum fuit potestate legem assertius conscribere.* 3d, Neither of the contracting powers is allowed to interpret the treaty at his own pleasure. 4th, As the party which made the promise ought to have known his intention, what he has sufficiently declared must be taken for true against him. 5th, The interpretation should be made according to the rules established for determining the sense in which the parties naturally understood it when the treaty was entered into. He



next proceeds to lay down the following particular rules on which the interpretation ought to be formed, in order to be just and right. 1st, We must seek to discover the thoughts of the parties who drew up the treaty, and interpret it accordingly. Thus, we must give to a disposition the full extent properly implied in the terms, if such appears to have been the intention of the parties; but its signification should be restrained, if it is probable that the parties at the time so understood it. 2d, No mental reservations can be admitted. 3d, Common expressions and terms are to be taken according to common custom. 4th. Technical terms, or terms proper to the arts and sciences, are generally to be interpreted according to the definition given to them by persons versed in such art or science. 5th, We should give to equivocal expressions the sense most suitable to the subject or matter to which they relate. 6th, The same term is not necessarily to be taken in the same sense wherever it appears in the same instrument. 7th, Every interpretation that leads to an absurdity should be rejected. 8th, An interpretation that would render a treaty null and without effect should be rejected. 9th, Vague and obscure expressions should be interpreted in such a manner as to agree with the terms which are clear and without ambiguity. 10th, The whole treaty must be considered together, and an interpretation given to each particular expression so as to agree with the tenor of the whole instrument. 11th, The words of a party should be construed in accordance with the general reasons and motives of the agreement. 12th, The interpretation may be restrictive or extensive according to reasons and probable intention of the contracting parties. The foregoing is a brief statement of the rules laid down and discussed at great length by Vattel. (*Vattel, Droit des Gens*, liv. 2, ch. 17, §§ 263-298; *Smith, Com. on Stat. and Con. Law*, ch. 12; *Story, Com. on the Constitution*, vol. 1, ch. 5; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 15; *Bello, Derecho Internacional*, pt. 2, cap. 10, § 3.)

§ 13. Where treaties or treaty stipulations are in collision or opposition, that is, where two promises are not contradictory in themselves, but are of such a nature as to render it impossible to fulfil both at the same time, Vattel lays down

the following rules for determining which shall have the preference. 1st, If what is permitted is incompatible with what is prescribed, the latter is to be preferred. 2d, What is permitted must yield to what is forbidden. 3d, What is ordained must yield to what is forbidden. 4th, Other things being equal, that of the most recent date is to be preferred. 5th, A special promise is to be preferred to a general one. 6th, What, from its nature, cannot be delayed is to be preferred to what may be done at another time. 7th, When two promises or duties are incompatible, that of the highest honesty and utility is to have the preference. 8th, If we cannot perform at the same time two promises to the same person, he may select which he prefers. 9th, The stronger obligation has the preference over the weaker; and 10th, What is promised under the higher penalty, has the preference over one with the lesser penalty, or with no penalty at all. (*Vattel, Droit des Gens*, liv. 2, ch. 17, §§ 311–322; *Puffendorf, de Jure Gent.*, lib. 5, cap. 12, § 23; *Phillimore, On Int. Law*, vol. 2, §§ 96, et seq.; *Grotius, de Jur. Bel. ac Pac.*, lib. 2, cap. 16, § 29; *Rutherford, Institutes*, b. 2, ch. 7; *The Ringrode Jacob*, 1 Rob. Rep., pp. 89, 90; *Richardson v. Anderson*, 1 Camp. Rep., p. 65, note; *Wildman, Int. Law*, vol. 1, p. 185, note; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 15; *Bello, Derecho Internacional*, pt. 2, cap. 10, § 5.)

§ 14. Rutherford has discussed this subject with his usual perspicuity and ability, but in a manner somewhat diffuse. We will attempt but a brief outline of his remarks, referring the reader to his chapter on interpretation, the perusal of which will afford both pleasure and profit. A promise, he says, gives us a right to whatever the promiser designed or intended to make ours. But his design or intention, if it be considered merely as an act of his mind, cannot be known to any one besides himself. When, therefore, we speak of his design or intention as the measure of our claim, we must necessarily be understood to mean the design or intention which he has made known or expressed by some outward work; because a design or intention, which does not appear, can have no more effect, or can no more produce a claim, than a design or intention which does not exist. Hence, the way to ascertain our claims, as they arise from promises or

contracts, is to collect the meaning and intention of the promiser or contractor, from some outward signs or marks. The collecting of a man's intention from such signs or marks is called *interpretation*. (*Rutherford, Institutes*, b. 2, ch. 7, §1; *Smith, Com. on Stat. and Con. Law*, ch. 12.)

§ 15. The remarks of Dr. Paley, in his work on Moral and Political Philosophy, are well worthy of attention, being as applicable to questions of international law as to questions in ethics. He says: "Where the terms of promise admit of more senses than one, the promise is to be performed in that sense in which the promiser apprehended at the time that the promisee received it." "It is not the sense in which the promiser actually intended it, that always governs the interpretation of an equivocal promise, because, at that rate, you might excite expectations which you never meant, nor would be obliged to satisfy. Much less is it the sense in which the promisee actually received the promise; for, according to that rule, you might be drawn into engagements which you never designed to undertake. It must, therefore, be the sense, (for there is no other remaining,) in which the promiser believed that the promisee accepted the promise. This will not differ from the actual intention of the promiser, where the promise is given without collusion or reserve; but we put the rule in the above form to exclude evasion in cases in which the popular meaning of a phrase, and the strict grammatical signification of the words differ; or, in general, wherever the promiser attempts to make his escape through some ambiguity in the expressions which he used. Zemures promised the garrison of Sebastia, that if they would surrender, no blood should be shed. The garrison surrendered,—and Zemures buried them all alive. Now Zemures fulfilled the promise in one sense, and in the sense, too, in which he intended at the time; but not in the sense in which the garrison of Sebastia actually received it, nor in the sense in which Zemures himself knew that the garrison received it; which last sense, according to our rule, was the sense in which he was, in conscience, bound to have performed it." (*Paley, Moral and Pol. Philosophy*, b. 3, pt. 1, ch. 5; *Chitty, On Contracts*, p. 73.)

§ 16. Many efforts have been made by other writers to lay down precise and positive rules, and to frame formulæ for the various modes of interpretation. In order to facilitate this, a nomenclature of classes, modes and species of construction has been attempted, and numerous cases, actual or possible, have been resorted to for the purpose of elucidating these definitions, and of exhibiting the application of these rules. Thus, Leiber distinguishes between interpretation and construction, dividing the former into close, extensive, extravagant, limited or free, predestinated, and authentic; and the latter into close, comprehensive, transcendant, and extravagant. The classifications, rules, and arbitrary formulæ which he has given under these heads, are more calculated to astonish and puzzle the reader, as a metaphysical curiosity, than to afford any real assistance in the interpretation or construction of treaties or laws. The same remark is applicable, in a qualified sense, to the numerous rules of the learned Domat. Others, again, as Mackelday and Phillimore, have adopted a more simple classification, and fewer and more general rules; but their distinctions, although exceedingly ingenious, are of very little practical utility. (*Leiber, Legal and Pol. Hermeneutics*, pp. 120, 144, 167–172; *Domat, Loix Civiles*, liv. prel. tit. 1, sec. 2; *Story, On the Constitution*, vol. 1, ch. 5; *Phillimore, On Int. Law*, vol. 3, pt. 5, ch. 8; *Sedgwick, On Stat. and Const. Laws*, pp. 226–396; *Smith, On Stat. and Consl. Construction*, ch. 12; *Savigny, Das Obligationen Recht*, b. 2, p. 189; *Wildman, Int. Law*, vol. 1, pp. 177, et seq.; *Rayneval, Inst. du Droit Nat.*, liv. 3, ch. 24; *Riquelme, Derecho Pub. Int.*, liv. 1, tit. 1, cap. 15; *Bello, Derecho Internacional*, pt. 2, cap. 10, § 3; *Heffier, Droit International*, § 95; *Pando, Derecho Int.*, pp. 230, et seq.)

§ 17. The best modern writers on interpretation have confined themselves to stating the general principles which are to guide us in ascertaining the true meaning of a treaty, law or contract, avoiding all metaphysical distinctions, minute subdivision of terms, and the use of arbitrary formulæ. Of this character are the rules laid down by Story, in his *Commentaries on the Constitution of the United States*. He regards some of the rules of Vattel as erroneous, but speaks in high terms of those given by Rutherford, a summary of

which is found in the preceding paragraphs. Savigny regards the civil law rules of interpretation—which are substantially those of Domat—as affording little aid beyond that which an intelligent and dispassionate consideration of each particular case would furnish. Sedgwick thinks it “as vain to attempt to frame positive and fixed rules of interpretation as to endeavor, in the same way, to define the mode by which the mind shall draw conclusions from testimony.”

\* \* “Nor do I believe it easy to prescribe any system of rules of interpretation for cases of ambiguity in written language, that will really avail to guide the mind in the decision of doubt.” (*Story, On the Constitution*, vol. 1, ch. 5; *Savigny, Das Obligationen Recht*, b. 2, p. 189; *Smith, On Stat. and Con. Construction*, ch. 12; *Sedgwick, On Stat. and Con. Laws*, ch. 6; *Wildman, Int. Law*, vol. 1, pp. 177, et seq.; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 15; *Heffler, Droit International*, § 95.)

§ 18. But while we fully agree with Savigny and Sedgwick, that metaphysical classifications, minute subdivisions, and arbitrary formulae, are not calculated to facilitate the interpretation and construction of laws, it must not be inferred that all rules established for that purpose should be rejected. On the contrary, general rules, which restrain from latitudinarian construction, and from extravagant and false interpretation, have received the approval of the most learned jurists and most distinguished publicists of all ages. Indeed, the very necessity and importance of such rules, for the interpretation of constitutional and statutory laws, have led some authors into the extravagant nomenclature and minute classification which are here objected to. Sedgwick, notwithstanding his objection to rules, very justly remarks that “there must be some general principles to control” the construction and interpretation of laws, the subject being too important “to be left to the mere arbitrary discretion of the judiciary.”

And if the necessity of well established rules for the interpretation of laws be generally admitted, it certainly will hardly be denied that such rules are equally important in connection with international jurisprudence. Some of the bloodiest wars that have been inflicted upon the human race

have originated in a conflict of opinions respecting the interpretation of treaty stipulations. Moreover, it not unfrequently happens, that when one nation seeks an excuse for quarrelling with another, or for encroaching upon another's rights, some old and long forgotten treaty is brought forth from the dusty archives, or some new interpretation is introduced, with the corresponding allegations of a violation of its stipulations. It is not pretended that any rules of interpretation, however complete or well established they may be, will entirely prevent such conflicts and aggressions; nevertheless, they will greatly contribute toward such a result, or, at least, will prevent the real aggressor in an unjust war from escaping the odium which should attach to one who disturbs the peace of nations, under the cloak of a false interpretation of treaty stipulations. (*Sedgwick, On Stat. and Con. Laws*, ch. 6; *Smith, On Stat. and Con. Construction*, ch. 12; *Vattel, Droit des Gens*, liv. 2, ch. 17, § 262; *Wheaton, Hist. Law of Nations*, p. 170; *Riquelme, Derecho Pub. Int.*, lib. 1, tit. 1, cap. 15; *Bello, Derecho Internacional*, pt. 2, cap. 10.)

THE END.











